161 U S 513

TRANSCRIPT OF RECORD.

161-373.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. ~~173.~~ 430 134

JOSHUA M. DUSHANE, ASSIGNEE IN BANKRUPTCY OF ABRAHAM O. TINSTMAN, PLAINTIFF IN ERROR,

vs.

ALPHEUS BEALL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED JULY 9, 1892.

(15,080.)

(15,080.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 772.

JOSHUA M. DUSHANE, ASSIGNEE IN BANKRUPTCY OF ABRAHAM O. TINSTMAN, PLAINTIFF IN ERROR,

vs.

ALPHEUS BEALL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

INDEX.

	Original.	Print.
Petition for writ of error	1	1
Order allowing writ of error	4	2
Writ of error	5	2
Citation (copy)	7	3
Bond	8	3
Docket entries	10	5
Appeal and affidavit	12	5
Præcipe for certiorari	13	6
Transcript from court of common pleas	15	7
Continuance docket entries	15	7
Judgment docket entries	19	9
Præcipe for attachment execution	20	9
Writ of attachment execution	21	9
Præcipe for rule to choose arbitrators	24	10
Rule to choose arbitrators	25	11
Præcipe for alias rule to choose arbitrators	26	11
Alias rule to choose arbitrators	27	11
Choice of arbitrators	28	12

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 13, 1893.

	Original.	Print.
Certificate of appointment of arbitrators	29	13
Finding of arbitrators	30	13
Intervention of Joshua M. Dushane	31	14
Interrogatories and rule on garnishee	33	15
Interrogatories and rule on garnishee	36	15
Appeal from award of arbitrators	38	16
Præcipe for rule on plaintiff to join issue	40	17
Rule on plaintiff to join issue	41	17
Answer to claim of J. M. Dushane	42	18
Withdrawal of intervention of J. M. Dushane	43	18
Plea of J. M. Dushane	44	18
Request of Dushane for leave to be added to record	45	19
Case stated	46	19
Addition to case stated	49	21
Opinion	51	21
Order for judgment	54	23
Exception to order for judgment	55	23
Clerk's certificate	56	23
Writ of certiorari	57	24
Assignment of errors	59	24
Opinion	61	25
Remittitur	65	27
Clerk's certificate	67	27
Chief justice's certificate	68	28
Clerk's certificate	68	28
Assignment of errors	69	28

1 *Petition for Writ of Error.*

To the Honorable Edward M. Paxson, LL. D., chief justice of Pennsylvania:

The petition of Joshua M. Dushane, assignee in bankruptcy of Abraham O. Tinstman, respectfully showeth—

That your petitioner brought suit into the supreme court of Pennsylvania for the eastern district, to January term, 1892, No. 333, by writ of certiorari and an appeal from a decree of the court of common pleas of Fayette county, at No. 28 of September term, 1888, in which suit in said supreme court your petitioner was the appellant, Alpheus Beall being the appellee in said supreme court and the complainant in said court of common pleas.

That the said suit in the said court of common pleas was by attachment in execution, wherein the said Alpheus Beall claimed $947.43, the property of Abraham O. Tinstman, being in the possession of the Pittsburg and Connellsville Railroad Company as garnishee, which money your petitioner, as assignee in bankruptcy of the said Abraham O. Tinstman, claimed as a part of the assigned estate of the said Abraham, your petitioner having intervened in the said action of attachment in execution in the said court of common pleas and the said court of common pleas having given final judgment against him and in favor of the said Alpheus Beall, awarding the said $947.43 to the said Alpheus.

2 That on the 23rd day of May, 1892, the supreme court of Pennsylvania, sitting at Philadelphia, ordered the said judgment to be affirmed, and afterwards, on the 23rd day of May, 1892, the said judgment was duly entered and recorded in the eastern district of Pennsylvania aforesaid.

That the said judgment of the said supreme court is a judgment of the highest court of record of the Commonwealth of Pennsylvania.

That the judgment of the said court is final.

That the right, title, privilege, and immunity claimed by your petitioner, plaintiff, intervenor, and appellant as aforesaid, were claimed under the statute laws of the United States regulating bankruptcy; all of which appears of record.

That the decision and judgment of the supreme court of Pennsylvania aforesaid was against the right, title, privilege, and immunity so claimed.

That the said court of common pleas of Fayette county and the supreme court of Pennsylvania have and had no jurisdiction over the subject-matter of the controversy, but that the jurisdiction is by the Constitution and the statute laws of the United States exclusively vested and cognizable in the Federal courts, and therefore the said proceedings and judgment aforesaid are null and void and contrary to the Constitution and statute law of the United States in the premises.

3 Your petitioner therefore prays the allowance of a writ of error to the supreme court of Pennsylvania in order that the

said judgment of the supreme court of Pennsylvania may be re-examined and reversed or affirmed in the Supreme Court of the United States; and he will ever pray.

JOSHUA M. DUSHANE,
Assignee in Bankruptcy of Abraham O. Tinstman.

Joshua M. Dushane, being duly sworn according to law, deposes and says that the facts set forth in the above petition stated are true to the best of his knowledge and belief.

JOSHUA M. DUSHANE.

Sworn — and subscribed before me this 7th day of June, A. D. 1892.

[Seal of Notary Public.]

JOHN KURTZ, *N. P.*

Endorsement: No. —, S. C. U. S. No. 333, Jan'y T., 1892, S. C., E. D. Penna. Appeal of Joshua M. Dushane, assignee in bankruptcy of Abraham O. Tinstman, from the decree made in the case in which Alpheus Beall was plaintiff and the above-named appellant was intervenor and appellant.

4 And now, to wit, June 9th, 1892, citation awarded and writ of error allowed by me—

EDWARD M. PAXSON,
Chief Justice, S. C. of Penna.

Filed June 9th, 1892.

CAMPBELL.

5 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the chief justice and associate justices of the supreme court of the Commonwealth of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said supreme court before you or some of you, being the highest court of law or equity of the said Commonwealth in which a decision could be had in the said suit between Joshua M. Dushane, assignee in bankruptcy of Abraham O. Tinstman, *ads.* Alpheus Beall, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said Commonwealth on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such *their*

6 validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Joshua M. Dushane, assignee in bankruptcy of Abraham

O. Tinstman, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, at Philadelphia, this ninth day of June, A. D. 1892.

Seal U. S. Circuit Court, E. D. Pennsylvania.

SAMUEL BELL,
Clerk Circuit Court U. S., East. Dist. of Penna.

[Endorsed:] Joshua M. Dushane, assignee in bankruptcy of Abraham O. Tinstman, appellant, *vs.* Alpheus Beall. Writ of error.

7 *Copy of Citation.*

UNITED STATES OF AMERICA, *ss:*

To Alpheus Beall, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of Pennsylvania for the eastern district, wherein Joshua M. Dushane, assignee in bankruptcy of Abraham O. Tinstman, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward M. Paxson, chief justice of the supreme court of Pennsylvania, this ninth day of June, in the year of our Lord one thousand eight hundred and ninety-two.

EDWARD M. PAXSON,
Chief Justice of Pennsylvania.

July 1, 1892.—Service accepted.

S. E. EWING,
Att'y of Pl'ff Below.

8 *Certified Copy of Bond.*

Know all men by these presents that we, Joshua M. Dushane, as principal, and John Kurtz and Samuel Porter, of Connellsville, Fayette county, Pennsylvania, as sureties, are held and firmly

bound unto Alpheus Beall in the full and just sum of five hundred dollars, to be paid to the said Alpheus Beall, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 30th day of June, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas lately, at a term of court of the supreme court of the State of Pennsylvania, in a suit depending in said court between the said Alpheus Beall and A. O. Tinstman, wherein the said Joshua M. Dushane intervened, a judgment was rendered against the said Joshua M. Dushane's right to take and receive the money in controversy in the said suit, and the said Joshua M. Dushane having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit and a citation directed to the said Alpheus Beall citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington within 30 days from the date thereof:

9 Now, the condition of the above obligation is such that if the said Joshua M. Dushane shall prosecute his writ to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JOSHUA M. DUSHANE. [SEAL.]
JOHN KURTZ. [SEAL.]
SAMUEL PORTER. [SEAL.]

Sealed and delivered in presence of—
JAMES STAFFORD.
BENJ. PRITCHARD.

Approved by—
EDWARD M. PAXSON,
Chief Justice.

This bond is satisfactory.

S. E. EWING,
Att'y of Pl'ff Below.

I hereby certify that the above is a true and correct copy of the bond filed in above-entitled case.

In testimony whereof I have hereunto set my hand and the seal of said court, *of* Philadelphia, this 5th day of July, A. D. 1892.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

CHAS. S. GREENE,
Prothonotary.

10 In the Supreme Court of Pennsylvania in and for the Eastern District.

Copy of Docket Entries.

January Term, 1892. No. 333.

ALPHEUS BEALL, Plaintiff,
vs.
ABRAHAM O. TINSTMAN, with Clause of *Sci. Fa.* to The Pittsburgh and Connellsville Railroad Company as Garnishee, Defendants. } 333.

Edward Campbell.

Appeal of Joshua M. Dushane, assignee in bankruptcy of A. O. Tinstman, from the court of common pleas of the county of Fayette. Filed Feb'y 16, 1892.

Eo die.—Certiorari exit, ret'ble the second Monday of May, 1892.

May 9th, 1892.—Record returned and filed.

Eo die.—Assignments of error filed.

11 May 11th, 1892.—Argued.

May 23, 1892.—Judgment affirmed. Opinion by Paxson, C. J.

May 23, 1892.—Remittitur exit and with record sent to Hon. Edward Campbell.

June 10th, 1892.—Writ of error to the Supreme Court of the United States brought into office.

July 2nd, 1892.—Citation, with proof of service, filed.

July 5th, 1892.—Bond approved by Chief Justice Edward M. Paxson filed.

I hereby certify that the above and foregoing is a true and correct copy of the docket entries in the above-entitled case, so full and entire as appears of record in our said supreme court.

In testimony whereof I have hereunto set my hand and seal of said court, at Philadelphia, this 5th day of July, A. D. 1892.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

CHAS. S. GREENE,
Prothonotary.

12 *Appeal and Affidavit.*

Court of Common Pleas of the County of Fayette, September Term, 1888.

ALPHEUS BEALL, Plaintiff,
—
ABRAHAM O. TINTSMAN, with Clause of *Sci. Fa.* to The Pittsburgh and Connellville Railroad Company as Garnishee, Defendant. } No. 28.

Enter appeal on behalf of Joshua M. Dushane, assignee in bank-

ruptcy of A. O. Tintsman, from the judgment of the court of common pleas of the county of Fayette.

EDWARD CAMPBELL,
Appellant's Attorney.

To Charles S. Greene, proth'y c't, E. D.

COUNTY OF FAYETTE, *ss:*

Joshua M. Dushane, being duly sworn, saith that the appeal in this case is not intended for delay.

JOSHUA M. DUSHANE.

Sworn — and subscribed this 15 day of February, A. D. 1892.

HENRY A. WITT, *Proth'y.*

13 Endorsement: No. 333. January term, 1892, supreme court of Pennsylvania, eastern district. Alpheus Beall *vs.* Abraham O. Tinstman, with clause of *sci. fa.* to The P. & C. R. R. Co., garnishee; Joshua M. Dushane, assignee in bankruptcy of A. O. Tinstman, appellant. Appeal and affidavit. Filed Feb'y 16th, 1892, in supreme court. Edward Campbell.

Præcipe for Certiorari.

JOSHUA M. DUSHANE, Assignee in Bankruptcy of A. O. Tinstman, Appellant.

Certiorari to the court of common pleas of the county of Fayette, of September term, 1888. No. 28.

Issue certiorari to the court of common pleas of the county of Fayette to bring up record and proceedings in a certain action in said court, No. 28, September term, 1888, wherein Alpheus Beall was plaintiff and Abraham O. Tinstman, with clause of *sci. fa.* to The Pittsburgh and Connellsville Railroad Company as garnishee, was defendant.

Returnable to next term, *sec. reg.*

EDWARD CAMPBELL,
Attorney for Appellant.

To Charles S. Greene, proth'y sup. court, E. D.

14 Endorsement: No. 333. January term, 1892, supreme court of Pennsylvania, eastern district. Alpheus Beall *vs.* Abraham O. Tinstman, with clause of *sci. fa.* to The P. & C. R. R. Co., garnishee; Joshua M. Dushane, assignee in bankruptcy of A. O. Tinstman, appellant. Præcipe for certiorari. Filed Feb'y 16th, 1892, in supreme court. Edward Campbell.

15 *Copy of Record.*

FAYETTE COUNTY, *ss:*

In the Court of Common Pleas, No. 28, September Term, 1888.

Copy of continuance docket entries.

ALPHEUS BEALL
vs.
ABRAHAM O. TINSTMAN, with Clause of *Sci. Fa.* to The Pittsburgh and Connellsville Railroad Company as Garnishee. } 28.

Ewing, Campbell, for assignee.

Attachment execution sur-judgment, No. 92, December term, 1886, under sec. 35, act of June 16, 1836. Debt, $730.54; int. from Nov. 24, 1886; costs on orig., $8.00. Writ issued June 9, 1888; ret. first Monday of July, 1888. June 15, 1888, *nihil habit* as to def't, A. O. Tinstman, and service accepted for the Pittsburgh and Connellsville Railroad Company, garnishee, by S. L. Mestrezat, Esq., att'y for said company. So ans. Jos. O. Miller, sheriff. S. E. Ewing p'd $1.00. June 25, 1888, the garnishee, by its att'y, pleads "*nulla bona.*" And now, to wit, July 21, 1888, the defendants enter-
16 rule to choose arbitrators on August 6, 1888. Rule and copy issued *tarde venit.* Sh'ff Miller, 25c. And now, to wit, July 26, 1888, rule of July 21, 1888, stricken off; præcipe filed. Same day, alias rule to choose arbitrators on August 10, 1888, and copy issued, served July 26, 1888, personally on Alpheus Beall, pl'ff. Sh'ff Miller, $1.25. And now, to wit, August 10, 1888, the pl'ff, by his att'y, and Edward Campbell, Esq., att'y for def't, and Welty McCollough, assignee in bankruptcy, choose Ira E. Partridge, James C. Work, and Robert F. Hopwood, Esqrs., arbitrators, to meet at the auditor's office, in Uniontown, on August 27, 1888, at 10 a. m. Certificate and 4 copies issued. Served Aug. 11, 1888, personally on S. E. Ewing, Esqr., att'y for pl'ff. Same day, served on arbitrators and gave each a copy of writ. Sh'ff Miller, $3.00. August 31, 1888, intervention of Joshua M. Dushane filed. And now, to wit, Sept. 17, 1888, the plaintiff files interrogatories and enter a rule on the garnishee to make full, true, direct, and perfect answers in writing, under oath or affirmation, to the interrogatories on or before Oct. 2, 1888, or judgment *sec. reg.* Rule and copy issued. Rule served personally on C. E. Boyle, Esq., att'y for garnishee, by making known to him the contents of rule and interrogatories and giving him a true and attested copy thereof. Sh'ff Miller, $1.25. September 25, 1888, award of arbitrators filed finding for the plaintiff the sum of $810.89, with costs of suit; which said sum of, viz., 810.89, with costs, they find to be in the hands of the Pittsburgh and Connells-
ville Railroad Company, garnishee, judgment. Oct. 15, 1888,
17 J. M. Dushane appeals from the award of arbitrators in this case; affidavit and recognizance filed, and costs, viz., $44.35, paid pro. Witt. Dec. 18, 1888, rule on pl'ff to join issue on

garnishee; answer on ten days' notice or attachment to be dissolved; rule and copy issued; ruled served Dec. 19, 1888, personally on S. E. Ewing, att'y for def't; Sh'ff Miller, $1.25. March adj'd term, 1889, on list. May 22, 1889, continued to May 27, 1889; case stated to be prepared by the parties. Oct. 9, 1889, answer to J. M. Dushane; claim to the money attached in this case filed. December term, 1889, on list. Dec. 13, 1889, continued on account of death of assignee of A. O. Tinstman; said case not to be again placed on trial list until after appointment and appearance of another assignee in bankruptcy. *Per curiam.* April 23, 1890, Edward Campbell, Esq., appears for J. M. Dushane, assignee in bankruptcy of A. O. Tinstman. September term, 1890, on list. Sept. 11, 1890, J. M. Dushane withdraws his intervention in this case. Same day, affidavit of Joshua M. Dushane filed and said Dushane pleads the facts therein set forth. Same day, Joshua M. Dushane, assignee of A. O. Tinstman, appears in court and asks leave to be added to the record as defendant; to be submitted to the court in form of a case stated. Dec. 15, 1890, case stated filed. Dec. adj'd term, on arg't list. Feb'y 9, 1891, submitted; *c. a. v.* Feb. 1, 1892, agreement of attorneys of parties filed. And now, to wit, Feb. 1, 1892, for the reasons given in the foregoing opinion, it is hereby ordered and directed that
18 judgment be entered on the case stated in favor of the plaintiff and against the Pittsburgh and Connellsville Railroad Company, garnishee, for the sum of nine hundred and forty-seven and $\frac{43}{100}$ dollars (947.43), which sum shall include all costs, and that the plaintiff have execution for said sum, the debt due by said garnishee to said Tinstman, defendant, in satisfaction of his judgment debt, interest, and costs; and if the said garnishee refuse or neglect, on demand, to pay the same, then the same to be believed of the goods and chattels, lands and tenements, of the said garnishee according to law, as in the case of a judgment against it for its own proper debt, and that the said garnishee be thereon discharged as against said Tinstman and the said Dushane, assignee, for said sum so attached and levied in its hands, &c. *Per curiam.* Order and opinion filed.

Attest: HENRY A. WITT, *Proth'y.*

Said garnishee and said Dushane, assignee, except to the action of the court in directing judgment to be entered for the plaintiff on the case stated, and at their instance bill sealed.

NATH'L EWING. [SEAL.]

Feb. 15, 1892.—Joshua M. Dushane, assignee in bankruptcy of A. O. Tinstman, appeals from the judgment of the court; affidavit made by Joshua M. Dushane. Feb'y 17, 1892, writ of certiorari received and filed.

19 *Copy of Judgment Docket Entries.*

Defendant.	Plaintiff.	No	Term.	Year.	Debt.	Costs.	Interest from—	Date of judgment.	Reference.
Pittsburgh and Connellsville R. R. Co., gar.	Alpheus Beall.	28	Sept.	1888	810 89	.....	Sept. 25, 1888.	Sept. 25, 1888.	Award of arb'r's, Oct. 15, 1888. J. M. Dushane appeals.
Pittsburgh and Connellsville R. R. Co., gar.	Alpheus Beall.	28	Sept.	1888	810 89	.....	.....	Feb'y 1, 1892.	

20 *Præcipe for Writ of Attachment Execution.*

In the Court of Common Pleas of Fayette County.

ALPHEUS BEALL
vs.
ABRAHAM O. TINSTMAN, with Clause of *Sci. Fa.* to The Pittsburgh and Connellsville Railroad Company as Garnishee. } No. —. September Term, 1888.

Issue attachment execution under sec. 35, act of June 16, 1836, sur-judgment, at No. 92, December term, 1886. Debt, $730.54; interest from Nov. 24, 1886.

Costs. Ret'ble first Monday July, 1888.

S. E. EWING,
Att'y of Pl'ff.

June 9, 1888.

To Henry A. Witt, Esqr., proth'y.

21 Endorsement: No. 28. September T., 1888. Alpheus Beall *vs.* Abraham O. Tinstman, with clause of *sci. fa.* to The Pittsburgh and Connellsville Railroad Company. Præcipe for writ of attachment execution. Att'y, E., p'd $1.75.

[SEAL.] *Att. Ex. Sur-judg't.*

FAYETTE COUNTY, *ss:*

The Commonwealth of Pennsylvania to the sheriff of said county, Greeting:

Whereas Alpheus Beall, lately before our judge of our court of common pleas, at Uniontown, to wit, on the 24th day of November, A. D. 1886, by the judgment of our said court recovered against Abraham O. Tinstman the sum of seven hundred and thirty and $\frac{54}{100}$ dollars (730.54), lawful money of the United States, for debt, as also the sum of eight dollars, costs and charges by him about his suit in that behalf expended, whereof the said Abraham O. Tinstman — duly convict, as appears to us of record; and whereas it is alleged that the said judgment still remains due and unpaid to the

said Alpheus Beail, and that there are legacies, monies, estates, or effects belonging to the said Abraham O. Tinstman in the hands and possession — The Pittsburgh and Connellsville Railroad Company, as garnishee, liable to be attached and levied in satisfaction of the judgment aforesaid, now, we command you that you attach all and singular *and* the debts due to said Abraham O. Tints-
22 man and deposits of money made by him and goods or chattels pawned, pledged, or demised by him, in whose hands or possession soever the same may be found, and that you make known to the said Abraham O. Tinstman and Pittsburgh and Connellsville Railroad Company, garnishee, and all other persons from whom such debts may be due or in whose hands or possession such money, goods, or chattels, &c., may be found that they be and appear before our court of common pleas, to be holden at Uniontown, in and for said county, on the first Monday of July next, there to show cause why the judgment aforesaid should not be levied of the effects of said Abraham O. Tinstman in their hands, agreeably to the 35th section of act of assembly, passed the 16 day of June, 1836, relative to executions; and have you then and there this writ.

Witness the Hon. James Ingraham, president of our said court, at Uniontown, the 9 day of June, anno Domini one thousand eight hundred and eighty-eight.

HENRY A. WITT,
Prothonotary.

23 Endorsement: No. 28. Sept. T., 1888. Alpheus Beall *vs.* Abraham O. Tinstman, with clause of *sci. fa.* to The Pittsburgh and Connellsville Railroad Company as garnishee. Att. ex. sur-judg't, No. 92, Dec. T., 1886, under sec. 35, act of June 16, 1836. Ret. first Monday of July, 1888. Service accepted for P. & C. R. R. Co. S. L. Mestrezat, att'y for P. & C. R. R. Co. June 15, 1888. S. E. Ewing paid $1.00. S. E. Ewing.

June 15, 1888.—*Nihil habet* as to def't, A. O. Tinstman, and service accepted for The Pittsburgh and Connellsville Railroad Company, garnishee, by S. L. Mestrezat, Esqr., att'y for said company.

So answers—

JOS. O. MILLER, *Sh'ff.*

24 *Præcipe for Rule to Choose Arbitrators.*

In the Court of Common Pleas of Fayette County, Pennsylvania.

ALPHEUS BEALL
vs.
ABRAHAM O. TINSTMAN, with Clause of *Sci. Fa.* to The Pittsburgh and Connellsville R. Co.
} No. 28. September Term, 1888.

Issue rule *ex parte* def'ts to choose arbitrators on the 6 day of August next.

EDWARD CAMPBELL, *Def't's Att'y.*

To Henry A. Witt, Esqr., proth'y.

Endorsement: No. 28. Sept. term, 1888. Alpheus Beall *vs.* Abraham O. Tinstman, with clause of *scire facias* to The Pittsburgh and Connellsville R. R. Co. Præcipe for rule to choose arbitrators. Filed July 21, 1888. Campbell.

25 *Rule ex Parte Def'ts to Choose Arbitrators on Aug.* 6, 1888.

FAYETTE COUNTY, *ss:*

In the Court of Common Pleas of September Term, 1888.

ALPHEUS BEALL
vs.
ABRAHAM O. TINSTMAN, with Clause of *Sci. Fa.* to The Pittsburgh and Connellsville R. R. Co. } No. 28. Att. Ex.

And now, to wit, on the 21st day of July, A. D. 1888, the def'ts enter a rule of reference, wherein the said party state their determination to have arbitrators chosen, at the office of the prothonotary, in Uniontown, the 6 day of August, A. D. 1888, between the hours of ten in the forenoon and four in the afternoon of the same day, for the trial of all matters at variance in the above cause between the parties agreeably to the provisions of the act of assembly entitled "An act regulating arbitrations."

HENRY A. WITT,
Prothonotary.

26 Endorsement: No. 28. Sept. T., 1888. Alpheus Beall *vs.* Abraham O. Tinstman, with clause of *sci. fa.* to the Pittsburgh and Connellsville R. R. Co. Rule *ex parte* def'ts to choose arbitrators on August 6, 1888. *Tarde venit.* 25c. So answers Jos. O. Miller, sh'ff. Campbell.

Præcipe for Alias Rule to Choose Arb'ts.

In the Court of Common Pleas of Fayette County, Pennsylvania.

ALPHEUS BEALL
vs.
ABRAHAM O. TINSTMAN, with Clause of *Sci. Fa.* to The Pitttsburgh and Connellsville Railroad. } No. 28. September Term, 1888.

The prothonotary will please strike off rule of July 21, 1888, to choose arbitrators, not served, and issue alias rule to choose arbitrators on the 10 of Aug. next.

EDWARD CAMPBELL, *Pl'ff's Att'y.*

July 26, 1888.

To Henry A. Witt, Esqr., proth'y.

27 Endorsement: No. 28. September term, 1888. Alpheus Beall *vs.* Abraham O. Tinstman, with clause of *scire facias* to The P. & C. R. Company. Præcipe for alias rule to choose arb't's. Filed July 26, 1888. Campbell.

Alias Rule ex Parte Def'ts to Choose Arb't's on Aug. 6, 1888.

FAYETTE COUNTY, *ss:*

In the Court of Common Pleas of Sept. Term, 1888.

[SEAL.]

ALPHEUS BEALL
vs.
ABRAHAM O. TINSTMAN, with Clause of *Sci. Fa.* to The Pittsburgh and Connellsville R. R. Co. } No. 28.

And now, to wit, on the 26 day of July, A. D. 1888, the defendants enters an alias rule of reference, wherein the said party state their determination to have arbitrators chosen at the office of the prothonotary, in Uniontown, the 10th day of August, A. D. 1888, between the hours of ten in the forenoon and four in the
28 afternoon of the same day, for the trial of all matters at variance in the above cause between the parties, agreeably to the provisions of the act of assembly entitled "An act regulating arbitrations."

HENRY A. WITT,
Prothonotary.

Endorsement: No. 28. Sept. T., 1888. Alpheus Beall *vs.* Abraham O. Tinstman, with clause of *sci. fa.* to the Pittsburgh and Connellsville R. R. Co. Alias rule *ex parte* def'ts to choose arbitrators on August 6, 1888. Served July 26, 1888, personally on Alpheus Beall, pl'ff, by making known to him the contents of this writ and giving him a copy thereof. $1.25. So answer- Jos. O. Miller, sh'ff. Campbell.

And now, to wit, August 10, 1888, parties, by their attorneys, choose Ira E. Partridge, James C. Work, and Robert F. Hopwood arbitrators, to meet on Monday, August 27, 1888, at the auditor's office, in Uniontown, Pa., at 10 a. m.

EDWARD CAMPBELL,
Att'y for A. O. Tinstman and Welty McCollough, Assignee in Bankruptcy.

29 *Certificate of the App't of Arbitrators.*

FAYETTE COUNTY, *ss:*

In the Court of Common Pleas of Sept. Term, 1888.

[SEAL.]

ALPHEUS BEALL
vs.
ABRAHAM O. TINSTMAN, with Clause of *Sci. Fa.* to The Pittsburgh and Connellsville Railroad Company, as Garnishee. } No. 28. Att. Gar.

And now, to wit, on the 10 day of August, A. D. 1888, the pl'ff, by his att'y, and Edward Campbell, att'y of A. O. Tinstman, and Welty McCollough, assignee in bankruptcy, choose—

Ira E. Partridge, James C. Work, & Robert F. Hopwood, Esqrs.—

Arbitrators, to meet at the auditor's office, in Uniontown, on the 27 day of August, A. D. 1888, at 10 o'clock *of* the forenoon of the same day, for the trial of all matters in variance in the above cause between the parties.

I, Henry A. Witt, prothonotary of said court, do certify that the above-named arbitrators are in due form of law chosen, and
30 that they have fixed the above time and place of meeting, of which the parties interested, as well as the above-named arbitrators, are to take notice.

HENRY A. WITT,
Prothonotary.

And now, August 27, 1888, being the day set, all of the above-named arbitrators were present and duly sworn. Edward Campbell, Esqr., appeared for the defendant. The plaintiff did not appear, but it did appear that his attorney had been duly served on the 11th of August, 1888, and no sufficient cause was shown for his absence. We heard the proofs and allegations of the defendant. The defendant appears and an adjournment is asked for and granted till August 29, at 1 p. m. After hearing the parties a further adjournment was had till September 1st, at 9 a. m. The parties, by agreement, continued the hearing in this case again to September 12, at 10 a. m.; continued again till September 13; continued till September 15; and now, September 20, 1888, having heard the parties, their proofs and allegations, we do find for the plaintiff the sum of $810.89, with costs of suit, which said sum, viz., $810.89, with costs, we find to be in the hands of the Pittsburgh and Connellsville Railroad Company, garnishee.

R. F. HOPWOOD,
JAMES C. WORK,
Arbitrators.

Arbitrators' fees, $18.00.

Paid by S. E. Ewing.

31 Endorsement: No. 28. September term, 1888. Alpheus Beall *vs.* Abraham O. Tinstman, with clause of *sci. fa.* to the Pittsburgh and Connellsville R. R. Co. as garnishee. Certificate of the app't of arbitrators. Served Aug. 11th, 1888, personally on S. E. Ewing, Esqr., att'y for pl'ff, by making known to him the contents of this writ and giving him a copy thereof; same day served on the within-named arb't's and gave each a copy of this writ. $3.00. So answers Jos. O. Miller, sh'ff. Award filed Sept. 25, 1888. Campbell.

Intervention of Joshua M. Dushane.

In the Court of Common Pleas of Fayette County, Pennsylvania.

ALPHEUS BEALL *vs.* A. O. TINSTMAN, with Clause of *Scire Facias* to The P. & C. R. R. Co.	No. 28. September Term, 1888.

August 31, 1888, Joshua M. Dushane intervenes to claim the money involved in this attachment, the ownership thereof having passed from A. O. Tinstman to him.

32 Endorsement: No. 28. September term 1888. Alpheus Beall *vs.* A. O. Tinstman, with clause of *sci. fa.* to the P. & C. R. R. Co. Intervention of Joshua M. Dushane. Filed Aug. 31, 1888.

33 *Interrogatories and Rule on Garnishee, &c., to File Answers. Rule on Garnishees and Interrogatories.*

In the Court of Common Pleas of Fayette County. No. 28. September Term, A. D. 1888.

ALPHEUS BEALL *vs.* ABRAHAM O. TINSTMAN, with Clause of *Sci. Fa.* to The Pittsburgh and Connellsville R. R. Co. as Garnishee.	Execution Attachment. Sur-judgment. No. —. —— Term, A. D. 18—.

And now, to wit, September 17, 1888, rule on Pittsburgh and Connellsville Railroad Company, garnishee in above-stated case of execution attachment, to make full, true, direct, and perfect answers in writing, under oath or affimation, to the interrogatories
34 annexed hereto on or before Oct. 2, 1888, or judgment sec. reg.

A true copy.

S. E. EWING,
Plaintiff's Att'y.

Attest:
[SEAL.] HENRY A. WITT, *Proth'y.*

Interrogatories to Garnishee.

First interrogatory. Do you know the parties, plaintiff and defendant, to the above suit?

Second interrogatory. State whether you have any moneys, goods, wares, merchandise, or any evidence of indebtedness in your hands, possession, or control belonging to the said defendant or in which he has or had any interest or claim. If yes, state the amount, description, and kind of said indebtedness and annex to your answer to these interrogatories a true and correct account of all such indebtedness.

Third interrogatory. State whether or not at the time of the service of the writ of attachment in the above-mentioned case on you there were any moneys, goods, wares, merchandise, bonds, or credits in your hands, control, or custody in which the defendant had any interest; also state whether any money, goods, merchandise, or effects or any nature or description have since that
35 time come into your hands, custody, or control in which the defendant has any interest, directly or indirectly.

Fourth interrogatory. Are you in any manner indebted to the defendant?

S. E. EWING.
Pl'ff's Att'y.

Endorsement: No. 28. Sept. T., 1888. Alpheus Beall *vs.* Abraham O. Tinstman, with clause of *sci. fa.* to the Pittsburgh and Connellsville R. R. Co., as garnishee. Interrogatories and rule on garnishee, &c., to file answers on or before Oct. 2, 1888. Served Sept. 17, 1888, personally on C. E. Boyle, Esqr., att'y for garnishee, by making known to him the contents of this rule and interrogatories and giving him a true and attested copy thereof. $1.25. So answers Jos. O. Miller, sh'ff. S. E. Ewing.

36 *Interrogatories to Garnishee.*

Rule on garnishees and interrogatories.

In the Court of Common Pleas of Fayette County. No. 28. September Term, A. D. 1888.

ALPHEUS BEALL *vs.* ABRAHAM O. TINSTMAN, with Clause of *Sci. Fa.* to The Pittsburgh and Connellsville R. R. Co. as Garnishee.	Execution Attachment. Sur-judgment. No. —. ——Term, A. D. 18—.

And now, to wit, September, 17, 1888, rule on Pittsburgh and Connellsville Railroad Company, garnishee in above-stated case of execution attachment, to make full, true, direct, and perfect answers in writing, under oath or affirmation, to the interrogatories annexed hereto on or before Oct. 2, 1888, or judgment sec. reg.

S. E. EWING,
Plaintiff's Att'y.

Interrogatories to Garnishee.

First interrogatory. Do you know the parties, plaintiff and defendant, to the above suit?

37 Second interrogatory. State whether you have any moneys, goods, wares, merchandise, or any evidence of indebtedness in your hands, possession, or control belonging to the said defendant or in which he has or had any interest or claim? If yes, state the amount, description, and kind of said indebtedness and annex to your answer to these interrogatories a true and correct account of all such indebtedness.

Third interrogatory. State whether or not, at the time of the service of the writ of attachment in the above-mentioned case on you, there were any moneys, goods, wares, merchandise, bonds, or credits in your hands, control, or custody in which the defendant had any interest; also state whether any money, goods, merchandise, or effects of any nature or description have since that time come into your hands, custody, or control in which the defendant has any interest, directly or indirectly.

Fourth interrogatory. Are you in any manner indebted to the defendant?

S. E. EWING,
Pl'ff's Att'y.

38 Endorsement: No. 28. Sept. T., 1888. Alpheus Beall *vs.* Abraham O. Tinstman, with clause of *sci. fa.* to the P. & C. R. R. Co. as garnishee. Interrogatories to garnishee. Filed Sept. 17, 1888.

Appeal from the Award of Arb'ts.

FAYETTE COUNTY, *ss:*

In the Court of Common Pleas, September Term, 1888.

ALPHEUS BEALL *vs.* ABRAHAM O. TINSTMAN, with Clause of *Sci. Fa.* to The Pittsburgh and Connellsville Railroad Co. as Garnishee.	No. 28.	Attachment.

And now, to wit, on the 15 day of October, 1888, *the* J. M. Dushane enters an appeal from the award of arbitrators in this case, and on his solemn oath saith that it is not for the purpose of delay that such appeal is entered, but because he firmly believes

39 injustice has been done.

J. M. DUSHANE.

Sworn and subscribed *coram*—

HENRY A. WITT,
Prothonotary.

You, J. M. Dushane, the principal, and you, John Wilkey, the bail, each acknowledge to owe to the plaintiff in the above action the sum of one hundred and fifty dollars, lawful money of the United States, to be levied of your several goods and chattels, lands and tenements, upon condition that you will pay all costs that may be legally recovered against the said appellant in said action, then this recognizance to be void; otherwise valid.

Taken and acknowledged this 15 day of October, A. D. 1888, before me—

HENRY A. WITT,
Prothonotary.

Endorsement: No. 28. Sept. T., 1888. Alpheus Beall *vs.* Abraham O. Tinstman, with clause of *sci. fa.* to the Pittsburgh and Connellsville R. R. Co. as garnishee. Appeal from the award of arb't's. Filed Oct. 15, 1888.

40 *Præcipe for Rule on Pl'ff.*

In the Court of Common Pleas of Fayette County, Pennsylvania, September Term, 1888.

ALPHEUS BEALL
vs.
A. O. TINSTMAN, with Clause of *Sci. Fa.* to The P. & C. R. R. Co. } No. 28.

Issue rule on pl'ff to join issue on garnishee's answers in ten days or attachment to be dissolved.

EDWARD CAMPBELL,
Att'y for Dushane & Tinstman.

To H. A. Witt, Esqr., proth'y.

Endorsement: No. 28. Sept. T., 1888. Beall *vs.* Tinstman *et al.* Præcipe for rule on pl'ff. Filed Dec. 18, 1888. Campbell.

41 *Rule on Pl'ff to Join Issue, &c.*

FAYETTE COUNTY, *ss:*

In the Court of Common Pleas, No. 28, September Term, 1888.

ALPHEUS BEALL
vs.
ABRAHAM O. TINSTMAN, with Clause of *Sci. Fa.* to The Pittsburgh and Connellsville Railroad Company as Garnishee. } Att. Ex.

And now, to wit, December 18, 1888, rule on plaintiff to join issue on garnishees.

Answer in ten days after notice or attachment to be dissolved.

[SEAL.] HENRY A. WITT,
Prothonotary.

Endorsement: No. 28. Sept. T., 1888. Alpheus Beall *vs.* A. O. Tinstman, with clause of *sci. fa.* to the P. & C. R. R. Co. as garnishee. Rule on plaintiff to join issue, &c. Served Dec. 19,
42 1888, personally on S. E. Ewing, Esqr., att'y for pl'ff, by making known to him the contents of this rule and giving him a copy thereof. $1.25. So answers Jos. O. Miller, sh'ff. Campbell.

Answers to J. M. Dushane's Claim to the Money Attached in this Case.

In the Court of Common Pleas of Fayette County.

ALPHEUS BEALL
vs.
A. O. TINSTMAN, with Clause of *Sci. Fa.* to The P. & C. R. R. Co. } No. 28. September Term, 1888.

October 9, 1889.—The plaintiff, Alpheus Beall, denies the right of J. M. Dushane to the ownership of the money attached in this case, and of the truth of this he puts himself upon the country, &c.

S. E. EWING,
Att'y of Pl'ff.

43 Endorsement: No. 28. September term, 1888. Alpheus Beall *vs.* A. O. Tinstman, with clause of *sci. fa.* to the P. & C. R. R. Co. Answer to J. M. Dushane's claim to the money attached in this case. Filed Oct. 9, 1889.

Withdrawal of J. M. Dushane's Intervention.

Common Pleas, Fayette County, Pennsylvania.

BEALL
vs.
TINSTMAN. } No. 28. September Term, 1888.

September 11, 1890.—J. M. Dushane withdraws his intervention in this case.

Endorsement: No. 28. September T., 1888. Beall *vs.* Tinstman *et al.* Withdrawal of J. M. Dushane's intervention. Filed Sept. 11, 1890.

44 *Plea.*

In the Court of Common Pleas of Fayette County, Pennsylvania.

ALPHEUS BEALL
vs.
THE P. & C. R. R. and Others. } No. 18, 1888. Att. Ex.

September 11, 1890.—Joshua M. Dushane, assignee in bankruptcy of A. O. Tinstman, defendant above named, having been duly sworn, says that on the — day of April, A. D. 1876, the said

A. O. Tinstman was put into involuntary bankruptcy by proceedings begun against him in the district court of the United States at Philadelphia, Pennsylvania, at No. 2703 of the said court, which proceedings are still pending and undetermined, and that this affiant is the assignee as aforesaid of the said A. O. Tinstman.

JOSHUA M. DUSHANE.

Sworn and subscribed this 11 day of September, 1890, before me—

HENRY A. WITT,
Prothonotary.

Endorsement: No. 28. Sept. T., 1888. Beall *vs.* Tinstman *et al.* Def't Joshua M. Dushane, assigee in bankruptcy of A. O. Tinstman, pleads the facts herein set forth. Sept. 11, 1890. Filed Sept. 11, 1890.

45 *Leave Asked to be Added to the Record as Defendant.*

Common Pleas, Fayette County, Pennsylvania.

BEALL
vs.
P. & C. R. R. *et al.* } No. 28. September Term, 1888.

Sept. 11, 1890.—Joshua M. Dushane, assignee of A. O. Tinstman, appears in court and asks leave to be added to the record as defendant.

Endorsement: No. 28. Sept. term, 1888. Beall *vs.* P. & C. R. R. Co. Filed Sept. 11, 1890.

46 *Case Stated.*

In the Court of Common Pleas of Fayette County, September T., 1888.

ALPHEUS BEALL
vs.
ABRAHAM O. TINSTMAN, with Clause of *Scire Facias* to The Pittsburgh and Connellsville Railroad Company as Garnishee; Joshua M. Dushane, Assignee in Bankruptcy of the said Abraham O. Tinstman, Intervening as Claimant of the Fund Attached. } No. 28.

Case stated.

It is hereby agreed that there is the sum of $947.43 in the hands of the garnishee, which is the amount of damages recovered on the interest of said defendant in the joint ownership of the Shaw line of telegraph between Uniontown and Connellsville, which said interest became the property of the said Tinstman by subscription and payment therefor in the year 1865; that the said amount
47 of $947.43 was awarded as damages, as shown by the copy of the *narr.* at No. 105, September term, 1882, filed herewith,

on the interest of said defendant in said telegraph line for a breach of contract contained in certain articles of agreement made and concluded between James L. Shaw and said garnishee relative to maintaining and working said telegraph line; that said damages cover the period from January 1, 1874, to September 1, 1887, and were recovered from the said garnishee by litigation begun by said James L. Shaw in the court of common pleas of the said county at No. 105, September term, 1882, James L. Shaw *vs.* Pittsburgh and Connellsville Railroad Company; that the said Abraham O. Tinstman was made one of the use plaintiffs in said action on October 2, 1885; that on the 5 day of April, 1876, the said A. O. Tinstman was adjudicated an involuntary bankrupt, and on the — day of April, 1876, Welty McCullough was appointed assignee in bankruptcy of the said A. O. Tinstman by regular proceedings under the bankrupt law, and that the said Welty McCullough took upon himself the duties of the said appointment; that the said Welty McCullough has died since the commencement of this suit and Joshua M. Dushane has been regularly appointed his successor as such assignee; that Abraham O. Tinstman was duly discharged as a bankrupt under the said proceedings on the 3 day of January, 1877; that the deed of the register in bankruptcy to said assignee conveyed only the property which said Tinstman possessed, "was interested in, or entitled to on the 5 day of April, 1876"
48 (see Deed Book No. 31, page 483), and that the schedule of assets filed by said assignee did not embrace said bankrupt's interest in said telegraph line.

That the said A. O. Tinstman, after his discharge as a bankrupt as aforesaid, engaged in business and became indebted to the said Alpheus Beall in the sum of $730.54, for which a judgment was rendered against him on the 24 day of November, 1886, at No. 92, December term, 1886, of the court of common pleas of Fayette county aforesaid, upon which judgment this attachment execution was issued on the 9 day of June, 1888, and was served on the said garnishee on the 15 day of June, 1888.

If upon these facts the court shall be of opinion that the said Alpheus Beall is entitled to payment of his said claim out of the said fund judgment is to be entered for the plaintiff for the sum of $947.43, which sum shall include all costs in this action; but, if the court shall be of a different opinion, judgment is to be entered for the defendants, with leave to all parties to sue out writs of error.

S. E. EWING, *Att'y of Pl'ff.*
EDWARD CAMPBELL,
Att'y for J. M. Dushane, Assignee in Bankruptcy of A. O. Tinstman.
S. L. MESTREZAT,
Att'y of Garnishee.

49 Endorsement: No. 28. September term, 1888. Alpheus Beall *vs.* Abraham O. Tinstman, with clause of *sci. fa.* to the P. & C. R. R.; J. M. Dushane, assignee in bankruptcy of A. O. Tinstman, intervening. Case stated. Filed Dec. 13, 1890. Campbell, Wakefield, for Dushane.

Addition to Case Stated.

In the Court of Common Pleas of Fayette County, Pennsylvania.

ALPHEUS BEALL *vs.* ABRAHAM TINSTMAN, with Clause of *Sci. Fa.*, &c.	No. 28. September Term, 1888.

Case stated.

It is hereby agreed that the following shall be added to and become a part of this case stated:

Welty McCullough, assignee in bankruptcy of said A. O. Tinstman, died August 31, 1889.

Joshua M. Dushane was appointed assignee in bankruptcy of said A. O. Tinstman in the place of said Welty McCullough on Dec. 14, 1889.

50 Joshua M. Dushane, said assignee, intervened in the above-styled case on September 11, 1890.

S. E. EWING, *Att'y of Pl'ff.*
EDWARD CAMPBELL,
Def't's Att'y & for J. M. Dushane, Assignee.
S. L. MESTREZAT,
For Garnishee.

Endorsement: No. 28. September term, 1888. Alpheus Beall *vs.* Abraham Tinstman. Addition to case stated. Filed Feb'y 1, 1892.

51 *Opinion and Order.*

Court of Common Pleas of Fayette County.

ALPHEUS BEALL *vs.* A. O. TINSTMAN, with Clause of *Sci. Fa.* to The P. & C. R. R. Co. as Garnishee, and J. M. Dushane, Assignee in Bankruptcy of said Tinstman, Intervening as Claimant.	No. 28. September Term, 1888. Attachment in Execution.

Case stated.

Opinion.

On April 5, 1876, A. O. Tinstman was adjudicated a bankrupt, and during the same month Welty McCullough was appointed the assignee, and that position was held by McCullough until his death, on Aug. 31, 1889. Tinstman obtained his discharge on January 3, 1877. On Dec. 14, 1889, Dushane was appointed assignee in place of McCullough, dec'd.

To Sept. term, 1882, No. 105, one Jas. L. Shaw instituted an action

of covenant against the P. & C. R. R. Co. to recover damages for the failure of said company to pay over one-half the earnings of a line of telegraph between Uniontown and Connellsville,
52 and in this suit said Tinstman was made a use plaintiff on Oct. 2, 1885. The result of this litigation was the entry of a judgment in favor of the plaintiff, in the fall of 1887, for a considerable amount, which judgment was affirmed by the supreme court May 21, 1888. Of this judgment Tinstman's share amounted to $947.43, which is the sum now in controversy.

After the discharge of Tinstman he became indebted to Alpheus Beall, the plaintiff, and for that indebtedness Beall obtained a judgment against him for $730.54 on Nov. 24, 1886, at No. 92, Dec. term, 1886. Upon that judgment this attachment execution was issued June 9, 1888, and served on said railroad company, garnishee, June 15, 1888. On Dec. 11, 1890, said Dushane intervened in this proceeding and made claim to said fund as assignee in bankruptcy of said Tinstman. This is the first time Tinstman's assignee appears, although the litigation began in the summer of 1882, and Tinstman himself went upon the record as a claimant in Oct., 1885.

Tinstman acquired his interest in said telegraph line in 1865, and the damages recovered from the railroad company were for the period from Jan'y 1, 1874, to Sept. 1, 1887.

To the claim now made by the assignee to this fund the plaintiff answers that the assignee has lost any right thereto which he may have had by reason of his neglect and delay for a period of over fourteen years from April, 1876, to Dec., 1890, to make
53 such claim or to take any steps to recover it from the railroad company or to do or say anything at all to indicate any intention even on his part to assert any right thereto, and the plaintiff also interposes the provisions of section 5057 of the Revised Statutes of the United States, act of March 2, 1867, chapter 176, section 2, which provides that "no suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee."

Without entering upon an extended discussion of the question it would certainly seem that an assignee in bankruptcy, with knowledge or means of knowledge of the bankrupt's title, and where no fraud or concealment is alleged, who stand- by without asserting his claim for an unreasonable time and until after third persons have, in the prosecution of their legal right, acquired an interest in or claim to the property, then comes too late to assert his claim, and especially should this be the case where the title of the bankrupt is contested, and only established after prolonged litigation, in which the assignee takes no part and incurs no liability, and to the fruits of which he makes no claim until considerably more than two years after they have been judicially ascertained and secured, and
54 after the rights of a third party, creditor of the bankrupt, have attached, and cost and expenses therein been incur-ed.

It also appears that the limitation of two years specified in the section of the Revised Statutes above quoted has been exceeded, not only in the contest with the railroad company for the establishment of the bankrupt's right and title, but also in this attachment proceeding, before the assignee's intervention.

For these reasons the claim of the assignee to this fund is denied and judgment entered on the case stated in favor of the attaching creditor, plaintiff in the action.

Order.

And now, to wit, Feb'y 1, 1892, for the reasons given in the foregoing opinion, it is hereby ordered and directed that judgment be entered in the case stated in favor of the plaintiff and against the Pittsburgh and Connellsville Railroad Company, garnishee, for the sum of $947.43, which sum shall include all costs, and that the plaintiff have execution for said sum, the debt due by said garnishee to said Tinstman, defendant, in satisfaction of his judgment debt, interests and costs; and if the said garnishee refuse or neglect, on demand, to pay the same, then the same to be levied of the goods and chattels, lands and tenements, of the said garnishee, recording below, as in the case of a judgment against it for its own
55 proper debt, and that the said garnishee be thereon discharged as against said Tinstman and the said Dushane, assignee, for said sum so attached and levied in its hands, &c.

PER CURIAM.

Attest: HENRY A. WITT, *Proth'y.*

Said garnishee and said Dushane, assignee, except to the action of the court in directing judgment to be entered for the plaintiff in the case stated, and at their instance bill sealed.

NATH'L EWING. [SEAL.]

Endorsement: No. 28. Sept. T., 1888. Alpheus Beall *vs.* A. O. Tinstman *et al.* Opinion and order. Filed Feb'y 1, 1892.

56 COMMONWEALTH OF PENNSYLVANIA, } *ss:*
Fayette County, }

I, Henry A. Witt, prothonotary of the court of common pleas in and for said county, certify that the foregoing is a full and correct copy of the docket entries of the case therein stated, wherein Alpheus Beall is plaintiff and Abraham O. Tinstman, with clause of *sci. fa.* to the Pittsburgh and Connellsville Railroad Co., garnishee, &c., defendant, as the same remains of record before the said court at No. 28 of Sept. term, A. D. 1888, to which are attached all the original papers on file.

In testimony whereof I have hereunto set my hand and [SEAL.] affixed the seal of the said court, at Uniontown, the 3 day of May, 1892.

HENRY A. WITT,
Prothonotary.

57 *Writ of Certiorari.*

EASTERN DISTRICT OF PENNSYLVANIA, } ss:
City and County of Pennsylvania, }

[SEAL.]

The Commonwealth of Pennsylvania to the justices of the court of common pleas No. —, for the county of Fayette, Greeting:

We, being willing for certain causes to be certified of the matter of the appeal of Joshua M. Dushane, assignee in bankruptcy of A. O. Tinstman from the judgment in No. 28, September term, 1888, (Alpheus Beall *vs.* Abraham O. Tinstman, with clause of *sci. fa.* to the Pittsburgh and Connellsville Railroad Company as garnishee), before you or some of you depending, do command you that the record and proceedings aforesaid, with all things touching the same, before the justices of our supreme court of Pennsylvania, at a supreme court to be holden at Philadelphia, in and for the eastern district, the second Monday of May next, being the 18 Monday following the first Monday of January, 1892, so full and entire as in our court before you they remain, you certify and send, together with this writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable Edward M. Paxson, doctor of laws, chief justice of our said supreme court, at Philadelphia, the 16
58 day of February, in the year of our Lord one thousand eight hundred and ninety-two.

CHARLES S. GREENE,
Prothonotary.

Endorsement: 28. Sept. T., 1888. C. P., Fayette. No. 333. January term, 1892. Supreme court. Alpheus Beall *vs.* Abraham O. Tinstman, with clause of *sci. fa.* to the P. & C. R. R. Co., garnishee. Joshua M. Dushane, assignee in bankruptcy of A. O. Tinstman, appellant. Writ of certiorari to the court of common pleas No. —, for the county of Fayette. Returnable the second Monday of May, 1892. Rule on the appellee to appear and plead on the return day of the writ. Filed Feb'y 17, 1892. Filed May 9th, 1892, in supreme court. Edward Campbell.

59 *Assignment of Error.*

No. 333. January Term, 1892.

ALPHEUS BEALL *vs.* ABRAHAM O. TINSTMAN, with Clause of *Sci. Fa.* to The Pittsburgh and Connellsville Railroad Co. as Garnishee, and JOSHUA M. DUSHANE, Assignee of A. O. Tinstman, Who Intervened.	Case Stated. Attachment in Execution. Appeal from the Court of Common Pleas of Fayette Co. No. 28. September Term, 1888.

Assignment of error.

The court erred in entering judgment for the plaintiff on the case stated, which judgment is as follows, viz:

Order.

"And now, to wit, February 1st, 1892, for the reasons given in the foregoing opinion, it is hereby ordered and directed that judgment be entered on the case stated in favor of the plaintiff and against The Pittsburgh and Connellsville Railroad Company, garnishee, for the sum of $947.43, which sum shall include all costs, and that the plaintiff shall have execution for said sum, the debt due by
60 said garnishee to said Tinstman, defendant, in satisfaction of his judgment debt, interest and costs, and if the said garnishee refuse or neglect on demand to pay, the same to be levied of the goods and chattels, lands and tenements, of the said garnishee according to law, as in the case of a judgment against it for its own proper debt, and that the said garnishee be thereon discharged as against said Tinstman and the said Dushane, assignee, for said sum so attached and levied in its hand, etc."

Endorsement: No. 333. January term, 1892. Alpheus Beall, plaintiff below and appellee, *vs.* Abraham O. Tinstman, with clause of *sci. fa.* to the Pittsburgh and Connellsville Railroad Company as garnishee, and Joshua M. Dushane, assignee in bankruptcy of A. O. Tinstman, who intervened, defendant below and appellant. Case stated. Attachment in execution. Assignment of error. Appeal from the court of common pleas of Fayette county. No. 28. Sept. T., 1888. Edward Campbell. Filed May 9th, 1892, in supreme court.

61 Supreme Court of Pennsylvania, E. D.

ALPHEUS BEALL *vs.* ABHAHAM O. TINSTMAN *et al.*, Appellants.	No. 333. January Term, 1892. Common Pleas of Fayette County.

Filed May 23rd, 1892.

PAXSON, *C. J.*:

This was an attachment execution in the court below. A suit had been commenced by James L. Shaw in 1882 against the Pittsburgh & Connellsville Railroad Company, and in this suit one A. O. Tinstman was made a use plaintiff on October 2nd, 1885. A judgment was recovered therein, of which the share of Tinstman amounted to $947.43, which is the sum in controversy. Tinstman became indebted *in* Alpheus Beall, the plaintiff, and for that indebtedness Beall obtained a judgment against him for $730.54 on October 4th, 1886. Upon that judgment this attachment execution was issued June 9th, 1888, and served on said railroad company, garnishee, June 15th, 1888. So far there is no difficulty. It appears, however, that in 1876 A. O. Tinstman was adjudicated a bankrupt and an assignee appointed. This assignee dies in August, 1889, and in December of the same year Joshua Dushane was appointed assignee in bankruptcy in his place. On December 11th,

1890, said Dushane intervened in this proceeding and made claim to said fund as assignee in bankruptcy of said Tintsman. This was the first move on the part of the assignee, although
62 the litigation began in the summer of 1882, and Tinstman himself appeared upon the record as a claimant to the fund in October, 1885, which was more than five years prior to the claim now made by the assignee.

The learned judge below held that the assignee was not entitled to the money because of his great delay, and also by reason of the provisions of section 5057, Revised Statutes of the United States, act of March 2nd, 1867, chapter 176, section 2, which provides that "no suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee."

We do not rest our decision upon the act above cited, as its application to the facts of this case is more than doubtful. We think, however, that the delay of the assignee is fatal to his claim. An assignee in bankruptcy is not bound to take possession of all property that vests in him by force of the assignment. It has always been a principle of the bankrupt law that property which, from its nature or condition, may be a burden rather than a benefit to the estate does not pass to the assignee without a distinct acceptance by him, and that in the absence of such acceptance it remains with the bankrupt. Glenny *vs.* Langdon, 98 U. S. R., 20; American File Company *vs.* Garret, 110th *id.*, 288. It is needless to
63 cite additional authorities for so plain a proposition. It is settled law both in England and in this country. In Amory *v.* Lawrence, 3rd Clifford, 523, the court held that where the assignee elects not to take the right of the bankrupt and charge the estate with the burden of an uncertain litigation, the right, whatever it is, survives to the bankrupt; and in Taylor *vs.* Irwin, 20 Federal Reporter, 615, it was held that it is for the assignee to determine whether or not in the given case he will assert his right to property. This election must be exercised within a reasonable time. A failure to do so may, as against third parties, be construed as an election not to claim the property, citing Amory *vs.* Lawrence, *supra*, and Smith *vs.* Gordon, 6 Law Rep., 313.

There was, perhaps, good reason why the assignee did not earlier assert his claim in this case. The matter involved was in litigation, which was protracted, uncertain, and expensive. He may have thought it wise not to burden the assigned estate with a litigation that might result in loss. Be that as it may, we do not think he can come in at this late day and gather the fruits of the litigation. The parties had a right under the circumstances to assume that he had made his election to abandon it. We are of opinion that the court below committed no error in awarding the fund to the attaching creditor.

Judgment affirmed.

64 I do hereby certify that the above and foregoing is a full, true, and accurate copy of the opinion delivered in the above-entitled cause in the supreme court of Pennsylvania, eastern district, and filed in the office of the prothonotary of said court.

In testimony whereof witness my hand and the seal of said court this 5th day of July, A. D. 1892.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

CHAS. S. GREENE,
Prothonotary.

65 *Remittitur.*

EASTERN DISTRICT OF PENNSYLVANIA, *sct:*

[SEAL.] The Commonwealth of Pennsylvania to the justices of the common pleas court for the county of Fayette, Greeting:

Whereas by virtue of our writ of certiorari from our supreme court of Pennsylvania for the eastern district, returnable in the same court on the second Monday of May, in the year of our Lord one thousand eight hundred and ninety-two, a record was brought into the same court, upon appeal by Joshua M. Dushane, assignee in bankruptcy of A. O. Tinstman, from your judgment made in the matter of No. 28, September term, 1888, wherein Alpheus Beall was plaintiff and Abraham O. Tinstman, with clause of *sci. fa.* to the P. & C. R. R. Co.'s garnishees, *were* defendant, and it was so proceeded in our said supreme court that the following decree was made, to wit: Judgment affirmed; and the record and proceedings thereupon and all things concerning the same were (agreeably to the directions of the act of assembly in such cases made and provided) by the said supreme court to be remitted to the court of common pleas for the county of Fayette aforesaid, as well for execution or otherwise, as to justice shall appertain; wherefore we remit you the record of the decree aforesaid and the proceedings thereupon in order for execution or otherwise, as aforesaid.

Witness the Honorable Edward M. Paxson, doctor of laws, chief justice of our said supreme court, *of* Philadelphia, the 23rd
66 day of May, in the year of our Lord one thousand eight hundred and ninety-two.

CHARLES S. GREENE,
Prothonotary.

Endorsement: 28. September T., 1888. C. P. Fayette. No. 333. January term, 1892. Supreme court. In the matter of the appeal of Joshua M. Dushane, assignee in bankruptcy of A. O. Tinstman. Remittitur. ——— ———, att'y. 3.00. Pro., 7.25; rem., .75 Filed May 26th, 1892. Edward Campbell.

67 UNITED STATES OF AMERICA, } *ss:*
State of Pennsylvania, }

I, Charles S. Greene, prothonotary of the supreme court of Pennsylvania, eastern district, do hereby certify that the foregoing record, pages 1 to 66, inclusive, is a true and faithful copy of the record and proceedings of the supreme court of the State of Pennsylvania,

eastern district, in a certain suit therein pending, wherein Joshua M. Dushane, assignee in bankruptcy of A. O. Tinstman, with clause of *sci. fa.* to the Pittsburgh and Connellsville Railroad Company as garnishee, was appellant and Alpheus Beall was appellee.

Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said supreme court of the State of Pennsylvania, eastern district, at Philadelphia, the 5th day of July, 1892, and in the one hundred and seventeenth year of the Independence of the United States.

CHAS. S. GREENE,
Prothonotary of the Supreme Court of Pennsylvania,
Eastern District.

68 I, Edward M. Paxon, chief justice of the supreme court of Pennsylvania, do hereby certify that Charles S. Greene was at the time of signing the annexed attestation and now is prothonotary of the said supreme court of Pennsylvania, in and for the eastern district, to whose acts as such full faith and credit are and ought to be given, and that the said attestation is in due form.

In witness whereof I have hereunto subscribed my name this fourth day of July, one thousand eight hundred and ninety-two.

EDWARD M. PAXSON.

I, Charles S. Greene, prothonotary of the supreme court of Pennsylvania, in and for the eastern district, do certify that the Honorable Edward M. Paxson, by whom the foregoing certificate was made and given, was at the time of making and giving the same and is now chief justice of the supreme court of Pennsylvania, to whose acts as such full faith and credit are and ought to be given, as well in courts of judicature as elsewhere, and that his signature thereto subscribed is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said supreme court of Pennsylvania, in and for the eastern district, at Philadelphia, this fifth day of July, one thousand eight hundred and ninety-two.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

CHAS. S. GREENE,
Prothonotary.

69 In the Supreme Court of the United States.

JOSHUA M. DUSHANE, Assignee in Bankruptcy of Abraham O. Tinstman,
vs.
ALPHEUS BEALL.
} No. 1110. October Term, 1892.

Assignment of Error.

The supreme court of Pennsylvania erred in affirming the judgment of the court of common pleas of Fayette county, Pennsylvania, which judgment is as follows, viz:

Order.

And now, to wit, Feb. 1st, 1892, for the reasons given in the foregoing opinion, it is hereby ordered and directed that judgment be entered on the case stated in favor of the plaintiff and against The Pittsburg & Connellsville Railroad Company, garnishee, for the sum of $947.43, which sum shall include all costs, and that the plaintiff have execution for said sum, the debt due by said garnishee to said Tinstman, defendant, in satisfaction of his judgment, debt, interest, and costs; and if the said garnishee refuse or neglect on demand to pay the same, then the same to be levied on the goods and chattels, lands and tenements of the said garnishee, according to law, as in the case of a judgment against it for its own proper debt, and that the said garnishee be thereon discharged as against said Tinstman and the said Dushane, assignee, for said sum so attached and levied in its hands, etc.

PER CURIAM.

Attest: HENRY A. WITT, *Proth'y.*

Said garnishee and said Dushane except to the action of the court in directing judgment to be entered for the plaintiff in the case stated, and at their instance bill sealed.

NATH'L EWING. [SEAL.]

Filed Febr'y 1, 1892.

The said Joshua M. Dushane, appellant as aforesaid and plaintiff in error, prays this honorable court for a reversal of the said
70 judgment of the said supreme court of Pennsylvania and court of common pleas of Fayette county and for a judgment of this court awarding the said money to the plaintiff in error.

EDWARD CAMPBELL,
Att'y for Pl'ff in Error.

[Endorsed:] Case No. 15,080. Supreme Court U. S., October term, 1892. Term No., 1110. Joshua M. Dushane, assignee, &c., pl'ff in error, *vs.* Alpheus Beall. Assignment of errors. Filed Nov. 29, 1892.

Endorsed on cover: Case No. 15,080. Pennsylvania supreme court. Term No., 772. Joshua M. Dushane, assignee in bankruptcy of Abraham O. Tinstman, plaintiff in error, *vs.* Alpheus Beall. Filed July 9th, 1892.

Office Supreme Court U. S.
FILED.
DEC 5 1895
JAMES H. McKENNEY,
CLERK

BRIEF OF PLAINTIFF IN ERROR.

IN THE

Supreme Court of the United States,

~~OCTOBER TERM 1895.~~

~~NO. 134.~~

NO. 134 OCTOBER TERM 1895.

JOSHUA M. DUSHANE,

Assignee in Bankruptcy of Abraham O. Tinstman,

Plaintiff in Error, Intervenor Below.

VS.

ALPHEUS BEALL,

Defendant in Error and Plaintiff Below.

NO. 28 SEPTEMBER TERM 1888,

Court of Common Pleas of Fayette County, Pennsylvania.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA, AFFIRMING THE DECISION OF HON. NATHANIEL EWING, A. L. J. OF THE COURT OF COMMON PLEAS OF FAYETTE COUNTY.

CASE STATED.

Attachment Execution with clause of Scire Facias to the Pittsburg and Connellsville Railroad Company, Garnishee.

EDWARD CAMPBELL, *Attorney of Plaintiff in Error.*

INDEX.

	Page.
Names of the Parties as They Stood in the Court Below,	2
Abstract of the Case,	2
Assignments of Error,	6
Argument,	8

APPENDIX.

Narr at 105 September Term 1882, Common Pleas of Fayette County, Pennsylvania,	28
Amendment to Narr,	29
Affidavit and Plea of J. M. Dushane,	31
Certificate of Appointment of Assignee,	32
Register in Bankruptcy's Deed to Assignee,	32
Certificate of Stock, (Telegraph Company,)	34

IN THE

Supreme Court of the United States,

OCTOBER TERM 1893.

NO. 772.

NO. 134 OCTOBER TERM 1895.

JOSHUA M. DUSHANE,

Assignee in Bankruptcy of Abraham O. Tinstman,

Plaintiff in Error, Intervenor Below.

VS.

ALPHEUS BEALL,

Defendant in Error and Plaintiff Below.

NO. 28 SEPTEMBER TERM 1888,

Court of Common Pleas of Fayette County, Pennsylvania.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA, AFFIRMING THE DECISION OF HON. NATHANIEL EWING, A. L. J. OF THE COURT OF COMMON PLEAS OF FAYETTE COUNTY.

CASE STATED.

Attachment Execution with clause of Scire Facias to the Pittsburg and Connellsville Railroad Company, Garnishee.

NAMES OF THE PARTIES AS THEY STOOD IN THE COURT BELOW.

In the Court of Common Pleas of Fayette County Pennsylvania. No. 28 September Term 1888.

ALPHEUS BEALL

vs.

ABRAHAM O. TINTSMAN, with clause of *Scire Facias* to The Pittsburg and Connellsville Railroad Company as Garnishee; JOSHUA M. DUSHANE Assignee in Bankruptcy of the said Abraham O. Tintsman, Intervening as Claimant of the Fund Attached.

CASE STATED.

ABSTRACT OF THE CASE.

On the 6th day of March 1865 James L. Shaw made an agreement under seal, with the Pittsburgh and Connellsville Railroad Company to build a line of telegraph in Fayette county, Pennsylvania, about twelve miles long, extending from Uniontown to Connellsville.

Under Shaw's agreement, the telegraph line when completed, was to be operated by the Railroad Company, and Shaw was to receive a certain per centage of the earnings thereof.

After the completion of his work, Shaw, in the year 1865 sold and assigned his rights under the contract to a number of persons, one of whom was Abraham O. Tinstman, who bought ten shares at $25 each. The Railroad Company observed their obligations under the Shaw contract for a time, and paid to Shaw's assigns, their share of the revennes of the line. Troubles arose between the Pittsburg and Connells-

ville Railroad Company and certain Telegraph Companies, resulting in the refusal of the Railroad Company to pay further dividends.

The stockholders resorted to legal proceedings against the Railroad Company, beginning April 29th 1878 by a Bill in Equity, in which many but not all of the stockholders joined. The action was, of course, for the benefit of all of them, although the bill does not particularly state this.

Litigation continued over this case for a number of years, and ended by the Pennsylvania Supreme Court deciding ~~in 1887~~ January 9th 1888, that a Bill in Equity would not lie—that the proper remedy was an action at law.

Pursuant to this development, the action at No. 105 September Term 1882 Common Pleas of Fayette County, mentioned in the case stated submitted to the Court of Common Pleas of Fayette County, was begun by Shaw's assigns, the owners of the Uniontown Telegraph Line, on the 10th day of July 1882. This action was brought in the name of Shaw alone, the contract being under seal, and the assignees very numerous. Afterwards, some but not all, of the use plaintiffs, were added to the record—some of them however, were never made actual record parties to the action, which moved along until the 3rd day of September 1887, when judgment was entered in the Common Pleas of Fayette county aforesaid against the P. & C. Railroad Company for $11766.17.

The Railroad Company appealed from this judgment to the Supreme Court of Pennsylvania, where the judgment of the Court below was affirmed on the 21st day of May 1888.

The Tinstman share of this judgment was $947.43. The question is, who owns it?

Shaw's assigns and successors in the Telegraph Line, were never incorporated, remaining, as they now are, simply co-owners of the Line. A. O. Tinstman, was on the 3rd

day of June 1876, adjudged an involuntary bankrupt, on a creditor's petition filed on the 5th day of April 1876, and was duly discharged on the 3d day of January 1877. On the 7th day of July 1876, Welty McCullough was chosen Assignee of A. O. Tinstman by the creditors. On the 8th day of July 1876, this choice was approved by the Court. On the 12th day of July 1876, McCullough accepted the said trust and on the 13th day of July 1876, an assignment of the bankrupt estate was issued to him by Register Harper. Tinstman engaged in business after his discharge and became indebted to Alpheus Beall, the defendant in error in the case now in hearing.

Beall sued Tinstman in the Court of Common Pleas of Fayette county aforesaid, at No. 92 December Term 1886, for the debt incurred after Tinstman's discharge, and on the 24th day of November 1886, obtained a judgment against him for the sum of $730.54.

On this judgment Beall issued an attachment execution against the $947.43, the Tinstman share of the Telegraph judgment, and that attachment execution is the case now before this Court for review.

This writ of attachment execution was issued on the 9th day of June 1888, at No. 28 September Term 1888, of the court of common pleas of Fayette county. The Pittsburg and Connellsville Railroad Company was summoned as garnishee.

Welty McCollough, the Assignee in Bankruptcy of Tinstman, appeared in the attachment, claimed the $947.43 in the garnishee's hands, and defended against Beall's attempt to seize the Tinstman money. Trans. of Record pages 7–8.

McCullough having died, J. M. Dushane, the plaintiff in error was on the 14th day of December 1889 appointed assignee of A. O. Tinstman instead of McCullough.

Dushane intervened in the attachment execution against Beall, on the 23d day of April 1890 (Trans. of Record p. 8, Marg. p. 17 and page 18, Marg. p. 44) took up the case where McCullough had left it, and has carried it on ever since.

As many of the forgoing facts as were considered by the counsel of both parties, to be material to the question, were embodied in a case stated, (Trans. of Record p. 19, Marg. p. 46.) on the 13th day of December 1890, and submitted to the Court of Common Pleas of Fayette county aforesaid, for the purpose of determining the title to the sum of money in the hands of the Pittsburg and Connellsville Railroad Company judgment debtor as aforesaid, as Garnishee.

The ten Tinstman shares in the Uniontown Telegraph Line, are entitled to $947.43 of the judgment.

The Court of Common Pleas of Fayette county aforesaid, per Ewing A. L. J., on the 1st day of February 1892, decided (Trans. of Record pages 21–22–23) that the plaintiff in error had lost his rights as assignee, to this portion of the Tinstman bankrupt estate, by the laches, of his predecessor McCullough, and himself, and also that section 5057 of the Revised Statutes of the United States, providing a two years limitation of the rights of Assignees, constituted a bar to the recovery of the fund at this time, by the plaintiff in error.

The plaintiff in error appealed from the decision of the Court of Common Pleas of Fayette county to the Supreme Court of Pennsylvania, and on the 23d day of May 1892, that Court affirmed the judgment of the Court of Common Pleas of Fayette county aforesaid.

The plaintiff in error presented his petition for an allocatur, to his Honor Chief Justice Paxson of the Supreme Court of Pennsylvania, and on the 9th day of June 1892 a citation was awarded and the writ of error was allowed.

ASSIGNMENTS OF ERROR.

I.

The Supreme Court of Pennsylvania erred in entering judgment as follows viz:

Transcript of Record, page 26: "We are of opinion "that the Court below committed no error in awarding the "fund to the attaching creditor."

"Judgment affirmed."

II.

The Supreme Court of Pennsylvania erred in affirming the order of the Court below awarding the fund to the attaching creditor, Alpheus Beall, which order is as follows viz:

"And now to wit Feby. 1st 1892, for the reasons given "in the foregoing opinion it is hereby ordered and directed "that judgment be entered on the case stated in favor of the "plaintiff and against the Pittsburg and Connellsville Rail-"road Company, garnishee, for the sum of $947.43, which "sum shall include all costs, and that the plaintiff have ex-"ecution for said sum, the debt due by said garnishee to "said Tinstman, defendant, in satisfaction of his judgment "debt, interest and costs; and if the said garnishee refuse or "neglect on demand to pay the same, then the same to be "levied of the goods and chattels, lands and tenements, of "the said garnishee, according to law, as in the case of a "judgment against it for its own proper debt, and that the "said garnishee be thereupon discharged as against said Tinst-"man' and the said Dushane assignee, for the sum so attached "and levied in its hands etc. PER CURIAM.

"Attest: HENRY A. WITT, Proth'y.

"Said garnishee and said Dushane except to the action "of the Court in directing judgment to be entered for the "plaintiff in the case stated and at their instance bill sealed.

NATHL. EWING. [SEAL]

"Filed Febry. 1st 1892."

Transcript of Record pages 28–29.

III.

The Supreme Court of Pennsylvania erred in affirming the judgment of the Court of Common Pleas of Fayette county, Pennsylvania, against the said plaintiff in error the said J. M. Dushane, Assignee in Bankruptcy of the said A. O. Tinstman and in favor of the said defendant in error Alpheus Beall, the said Court of Common Pleas and Supreme Court, having no jurisdiction of the subject matter of the said action at law, being a part of the estate of a bankrupt vested in his Assignee in Bankruptcy, jurisdiction whereof is exclusively vested and cognizable in the Federal courts.

Transcript of Record page 1.

IV.

The Supreme Court of Pennsylvania erred in holding that the plaintiff in error J. M. Dushane, Assignee in Bankruptcy of A. O. Tinstman was not entitled to the sum of $947.43, being the share of the said A. O. Tinstman in the judgment against the Pittsburg and Connellsville Railroad Company, and in deciding as follows to wit, "We do not think he (the Assignee in Bankruptcy) can come in at this late day and gather the fruits of the litigation. The parties had a right under the circumstances to assume that he (Dushane) had made his election to abandon it."

Transcript of Record page 26.

V.

The Supreme Court of Pennsylvania erred in not reversing the judgment of the Court of Common Pleas of Fayette county, and in not awarding the sum of money in controversy in this case viz: $947.43, in the hands of the Pittsburg and Connellsvelle Railroad Company garnishee, to the plaintiff in error; J. M. Dushane, Assignee in Bankruptcy of A. O. Tinstman.

ARGUMENT.

This is an attempt by a creditor, to snatch from an assignee in bankruptcy, a part of the assigned estate, and unless this court intervenes, the creditor, by the help of the Pennsylvania state courts, will be able to do it.

There is no dispute between the parties to the controversy about the material facts relevant to the issue, and the respective counsel agreed upon them, and embodied them in writing, for the consideration of the court below.

The "case stated" submitted to the Court of Common Pleas of Fayette county, Pennsylvania, (Transcript of Record pages 19–20–21) together with the copy of the Narr., at No. 105 September Term 1882 of that court, which was made a part of "the case stated," shows that the money in controversy in this case viz. $947.43, belonged to Abraham O. Tinstman. The plaintiff in error contends, that on the 9th day of June 1888, when this controversy arose over an attachment execution, the said money belonged to the said A. O. Tinstman's bankrupt assigned estate, and Alpheus Beall, the defendant in error, contends, that, at that time, the money belonged to the said A. O. Tinstman individually. The Court of Common Pleas of Fayette county, Pennsylvania, decided that the money belonged to Abraham O. Tinstman individually, and the Pennsylvania Supreme Court affirmed that decision. J. M. Dushane, assignee in bankruptcy of the said A. O. Tinstman, and plaintiff in error, contends that he is entitled to the money under the United States bankrupt law, and brings his writ of error in this case, to reverse the judgment as aforesaid, of the Pennsylvania Supreme Court.

A. O. Tinstman's title to the money began in 1865, when he bought from James L. Shaw ten shares of the par value of twenty-five dollars each of the capital stock of the Unioniown Telegraph Line. This Telegraph company was

not an incorporated company, but simply a union of forty or fifty co-owners.

Tinstman never by his own act parted with his stock, and he remained the owner of it, until his title to it passed from him to his assignee in bankruptcy. He was adjudicated an involuntary bankrupt on the 3d day of June 1876, on a petition of creditors filed on the 5th day of April 1876, and on the 8th–12th days of July 1876, Welty McCullough was appointed and accepted the appointment as his assignee. On the 12th of July 1876, McCullough accepted the said trust and on the 13th day of July 1876, an assignment of all the estate of the said bankrupt was issued to him.

That such proceedings as these, pass the entire title of the bankrupt to all his property, of whatsoever kind and wheresoever situated, cannot be disputed.

The following authorities among many others, settle this question beyond doubt:

Bumps Bankruptcy (4th Ed.) p. 322 § 14.

Mays vs. Manufacturers N. Bk. 4 Bank Reg. 147.

3 American Law Times 55.

In re Williams 2 Bank Reg. 79.

1 Law Times Bankrupt Rep. 107–113.

Rev. Statutes Section 5044.

Churchmans Estate 22 Weekly Notes of Cases 131.

Holbrook vs. Coney 25 Ill. 543.

Barton vs. Lockhert 9 Ark. 411.

Jewett vs. Preston 27 Me. 400.

French vs. Carr 7 Ill. 664.

The suit at No. 105 September Term 1882, of the Court of Common Pleas of Fayette county, Pennsylvania, against the Railroad Company, for the arrearages of receipts, dividends, earnings or rents, of the Telegraph Line, was originally brought in the name of Shaw alone, solely because of the great number of the owners of stock by assignment from Shaw. To have brought them all on the record, would

have encumbered it and all the papers in the case, unnecessarily with names, and for that reason, and to save a lawyer writing more than could not be avoided, and for no other reason, the names of the use plaintiffs were not put on the record at the start. Some of these owners of stock by assignment of Shaw, and Tinstman among the number, were afterwards for no particular reason, named upon the record, but *all* of the owners never were named on the record, unless it may have been done at the request of the Railroad Company in 1888, when the judgment was satisfied. Tinstman's name was never put upon the record on Tinstman's own motion or for any purpose of his, or to indicate or intimate that he had any claim or right individually to the $947.43.

Mr. Chief Justice Paxson, in delivering the opinion of the Supreme Court of Pennsylvania, affirming the judgment of the Court of Common Pleas of Fayette county aforesaid, says, (Transcript of Record page 26), "Tinstman himself appeared upon the record, as a claimant to the fund in October 1885." The Chief Justice does not say, how he *knows* that Tinstman so appeared. He can not know it from the "case stated," nor from the record before him, for neither of them make such a mistake. But Judge Ewing does make just that mistake, in his opinion, (Transc. of Record, p. 22 marginal p. 52,) and the Chief Justice evidently followed Judge Ewing into the error.

The Supreme Court of Pennsylvania, also follows Judge Ewing's judgment *literatim et verbatim*, when that Court declares, in delivering the judgment now under review—Trans. of Record pp. 25—26, marg. pp. 61–62—as follows viz., "On December 11th 1890, said Dushane intervened in this" "proceeding and made claim to said fund as assignee in bank-" "ruptcy of said Tinstman. This was the first move on the" "part of the assignee, although the litigation began in the" "summer of 1882, and Tinstman himself appeared upon the" "record as a claimant to the fund, in October 1882."

A simple reference by either of the Courts below, to the docket entries before them, would have avoided those four errors in those six lines of this, as the plaintiff in error thinks, erroneous judgment. First, the docket entries would have shown that Dushane as assignee, did not intervene in the Attachment Execution on December 11th 1890, but on April 23d and September 11th 1890. Second, that neither December 1890, April 23d 1890 nor September 1890, was the first appearance of Tinstman's Assignee in the Attachment Execution, as the docket entries—Transc. of Record p. 7, marg. p. 16—show him taking part in the case in August 1888. Third, that the litigation did not begin in the summer of 1882, but in April 1878; and Fourth, that Tintsman himself, never went upon the record as a claimant to the fund at all.

No explanation of the appearance of Tinstman's name upon the record, was included in the case stated, or ever given to the Court of Common Pleas or to the Pennsylvania Supreme Court, because no such explanation ever appeared to the counsel on either side, to be relevant or material to the question at issue. Judge Ewing just *assumed*, that the appearance of Tinstman's name on the record, meant that Tinstman individually, was in October 1885, a claimant for the money, but no one in authority, ever told him so, and he misinterprets the meaning and effect of involuntary bankruptcy proceedings, knowing as he did from the "case stated" the facts concerning Tinstman and his Telegraph stock, when he makes the mistake of interpreting the *prima facie* signification, of the records and proceedings in this case, to be, that in October 1885, Tinstman was asserting an individual claim to the $947.43. The facts and the record neither signify nor mean any such thing.

The fact that A. O. Tinstman became an involuntary bankrupt virtually on the 5th day of April 1876, is set forth in the case stated to the Court below, and this of itself, taken

together with the other facts therein stated, showing that Tinstman on the 5th day of April 1876, *owned*, the Telegraph stock, demonstrates, that on the 5th day of April 1876, A. O. Tinstman's dominion over the Telegraph stock and all its dividends, passed from him, and the further fact set forth to the Court below in the case stated, that on the 8th day of July 1876, Welty McCullough was appointed Assignee in Bankruptcy of Tinstman, demonstrates that on that day and on the 13th day of July 1876 the dominion over and the ownership of the Telegraph stock, passed to Welty McCullough. If Judge Ewing had not wandered from the case stated to him, he would not have gone astray on those points.

It is not disputed, that the ownership of the Telegraph stock carried with it the ownership of the dividends or revenues thereof, and the right to demand or receive them; which dividends or revenues and nothing else, compose the said sum of $947.43.

Even if A. O. Tinstman after April 5th 1876, had *claimed* these dividends for himself, what difference could that make, or how could it give him a right to them. In point of fact he never did so claim them, but how could the Supreme Court of Pennsylvania, in any degree whatever, correctly base the judgment in this case upon a claim by A. O. Tinstman in 1885, of ownership of these dividends. Such a fact, claim or circumstance, is entirely outside of the case stated to the Court below, and which was presented to the State Supreme Court for consideration. No such fact, claim or circumstance, being in existence, none was specified in the case stated, but if Tinstman had made such a claim, it is a clear error to accord to it any effect whatever upon this case. Any man may *claim* anything, but how such a claim by Tinstman, could properly either control or influence the decision of this case, is beyond comprehension. Of course it must have had its weight in the formation of the judgment of the Pennsylvania Supreme Court, or that Court would

not have enumerated it in the premises, but the plaintiff in error submits it to this Court as a clear mistake both of fact and law.

The Supreme Court of Pennsylvania, specifies the delay of the plaintiff in error, J. M. Dushane, as fatal to the present claim of Dushane, Assignee in Bankruptcy of A. O. Tinstman, to the $947.43.

On page 26 of the Transcript of Record, in the opinion of the Pennsylvania Supreme Court, marg. p. 62, it is said, "We think, however, that the delay of the Assignee is fatal to his claim."

The Supreme Court, expressly declines to affirm the decision of the Court of Common Pleas of Fayette county aforesaid that the two years limitation of section 5057 of the Rev. Statutes, governs the case in hand. Their honors say, "We do not rest our decision upon the act above cited, as its application to the facts of this case is more than doubtful." Transcript of Record page 26, marg. p. 62.

The Supreme Court then proceeds to cite authorities to show that the assignee is not bound to take possession of all property that vests in him by force of the assignment, and that property which from its nature or condition may be a burden rather than a benefit to the estate, does not pass to the assignee without a distinct acceptance by him, and that in the absence of such acceptance, it remains with the bankrupt—citing Glenny vs. Langdon 98 U. S. R. 20, and the American File Co. vs. Garrett 110 U. S. R. 288. The Supreme Court goes on to say, "It is needless to cite additional authorities for so plain a proposition. It is settled law both in England and this country. In Amory vs. Lawrence 3d Clifford 523, the Court held, that where the assignee elects, not to take the right of the bankrupt, and charge the estate with the burden of an uncertain litigation, the right, whatever it is, survives to the bankrupt; and in Taylor vs. Irwin 20 Federal R, 615, it was held that it is for the assignee to

determine whether or not in the given case, he will assert his right to property. This election must be exercised within a reasonable time. A failure to do so may, as against third parties, be construed as an election not to claim the property, citing Amory vs. Lawrence *supra*, and Smith vs. Gordon 6 Law Rep. 313."

The Court continues "There was, perhaps, good reason why the assignee did not earlier assert his claim in this case. The matter involved was in litigation, which was protracted, uncertain, and expensive. He may have thought it wise not to burden the assigned estate with a litigation, that might result in loss. Be that as it may, we do not think he can come in at this late day and gather the fruits of the litigation. The parties had a right under the circumstances, to assume that *he had made his election to abandon it.* We are of opinion that the Court below committed no error in awarding the fund to the attaching creditor. Judgment affirmed." Trans. of Record page 26, marginal p. 63.

Here, the Supreme Court of Pennsylvania sets up an imaginary presumption that Tinstman's Assignee in Bankruptcy, abandoned this portion of the bankrupt estate, and then, apparently, to excuse him from personal liability for doing such a thing, the Court again "presumes", that he had good reasons for doing so. The Court says, Trans. of Record page 26, marg. page 63, "The parties had a right under the circumstances, *to assume that he* (the assignee) *had made his election to abandon it,*" (the $947.43).

How do these two presumptions, serve for a basis of the judgment of the Pennsylvania Supreme Court, when the assignee in bankruptcy, himself is present positively denying both of them, and presents to the Court below, in the "case stated," a record showing that so far from making any "election to abandon" this item of the bankrupt estate, he has, since April 1878, been making the most vigorous and continuous efforts to recover this very item of property, and

has during that time been, with varying success, carrying on two lawsuits, resulting finally in the conclusive establishment of his right to it. Bnt now as he is about to take it into his own hand, the Court of Common Pleas of Fayette county aforesaid, and the Supreme Court of Pennsylvania, decide, that he has no right to it, and "award" it, to another. Of course the present assignee, the plaintiff in error, is entitled to credit for all the proceedings of his predecessor in the office of assignee. There is no break in the continuity of those proceedings, and it is merely gratuitous assertion to represent Dushane's acts in the premises, as independent of what had gone before.

The Pennsylvania Supreme Court says, in the opinion, Transcript of Record page 26, marg. p. 62, "This", Dushane's intervention of December (September) 11th 1890, "was the first move on the part of the assignee, although the litigation began in the summer of 1882, and Tinstman himself appeared upon the record as a claimant to the fund in October 1885, which was more than five years prior to the claim now made by the assignee."

These three very serious mistakes of fact, fatal to the correctness of the judgment in this case, appear as already suggested, in this opinion of the Pennsylvania Supreme Court, (Transcript of Record pages 25–26, marginal pages 61–62). The Court there declares, first, that Dushane's intervention in the attachment suit on Sept. 11th, 1890, was "the first move on the part of the assignee," second, that "the litigation began in the summer of 1882," and third, that "Tinstman himself appeared upon the record as a claimant to the fund in October 1885."

Now the mistakes here, are, that instead of the litigation beginning in the summer of 1882, it began in April 1878, that instead of Dushane's intervention on the 11th day of Sept. 1890, being the *first* "move" by the assignee in bankruptcy, it was simply one of a series of moves by the

assignees (two of them) of Tinstman, beginning with the beginning of the first action to recover from the Railroad Company the money now in dispute, on the 29th day of April 1878, and ending with the present "move", of laying the errors of the Courts below, before your Honors—and the third mistake, is, that instead of Tinstman himself, appearing upon the record as a claimant to the fund in October 1885, while it is true that in October 1885, Tinstman's name was placed on the record of the Common Pleas action for the Telegraph dividends, which constitute the fund in dispute, yet it is not true that he then claimed the fund for himself—nor did he ever claim it for himself, nor was his name ever put upon the record by himself at all, nor by any one else for any such purpose as claiming the money as Tinstman's own.

If the counsel for the parties, had considered the points involved in the three statements above mentioned, relevant or material to the issue to be decided by the Court of Common Pleas of Fayette county aforesaid, the facts touching those points would have been included in the case stated, and would have been set forth correctly. As it was, those points were not considered material, they were *not* mentioned, nor were they alluded to in the case stated, they are *not* material or relevant to the case in the case stated, and the plaintiff in error complains of it, as erroneous and unfair, to assume such facts, and base the judgment of the Court upon them.

The error begins in the opinion of the Court of Common Pleas of Fayette county aforesaid, (Transcript of Record page 22, marginal page 52), where these three allegations are stated by his Honor Judge Ewing, in delivering the opinion of the Court below; and although stated by him only by way of recital, yet the Supreme Court of Pennsylvania seems to base their judgment, mainly upon them. This is an error, because those facts are outside of the case before the Courts. The Court below, had no right to go outside of the case stated to them, for *any* facts; and it is also error,

because when the Pennsylvania Common Pleas and Supreme Court did go outside of the case stated, for their facts, they got them wrong. There is in this whole business from April 1878, when the Telegraph stockholders began their first lawsuit, to the present day, no more grounds for the assertion that "this (Dec. 11th 1890) is the first time Tinstman's assignee appears," (Judge Ewing's opinion. Transcript of Record p. 22), than there is for saying that none of the other forty or fifty stockholders of the Uniontown Telegraph Line "appeared," before that date. The record of the action in the Court of Common Pleas of Fayette county aforesaid, for the dividends of the Telegraph stock—Trans. of Record page 7, marginal page 16—shows Welty McCullough, Assignee in Bankrupty of A. O. Tinstman, on the 10th day of August 1888, choosing arbitrators in the case. The record of the same case,—Trans. of Record page 8, marginal page 17—shows as follows viz. "Dec. 13th 1889, case continued on account of the death of the assignee of A. O. Tinstman," and a special order by Judge Ewing as follows vs. "*said case not to be again placed on trial list until after appointment and appearance of another assignee in bankruptcy.*"

The next entry an the record of the same case is, as follows viz. "April 23d 1890, Edward Campbell Esq., appears for J. M. Dushane, Assignee in Bankruptcy of A. O. Tinstman." Yet on the 1st day of February 1892, his Honor Judge Nathaniel Ewing declares in his opinion upon the case stated, (Transc. of Record p. 22, marginal p. 52,) that "This, (Dushane's intervention of Dec. 11th 1890,) *is the first time that Tinstman's assignee appears* although &c." and the Supreme Court of Pennsylvania repeats the very same misstatement, on the 21st day of May 1892. (Transc. of Record pages 25–26, marginal pages 61–62)

These mistakes being pointed out, and the record of the case being shown to your Honors to stand clear of any

negligence or laches, on the part of either of Tinstman's assignees, and clear of any semblance of an election by either of them to abandon the $947.43 in dispute as a part of the assets of Tinstman's assigned estate, and clear of any claim to the said $947.43 by A. O. Tinstman individually, what foundation is there, for the judgment of the Supreme Court of Pennsylvania? Clearly, there is none whatever, That Court bases the decision now under review upon those three facts, and surely it will not bear an argument that if those facts are not found in the case stated, the judgment of the Court upon the case stated, can not stand. The plaintiff in error has shown to this Court that the three before mentioned foundation facts, of the judgment of the Supreme Court of Pennsylvania, are not only not in the case stated to the Courts below, but that they have absolutely no foundation or existence anywhere.

An immaterial error of fact, crept, by inadvertence, into the "case stated" to the Court of Common Pleas of Fayette county aforesaid, but it did no harm to the plaintiff in error, as the Court of Common Pleas does not regard it, but founds the judgment in this case altogether, upon six or seven speciffed items, grouped under the head of the assignee's "delay", and upon the two years limitation of section 5057 of the Revised statues. The Supreme Court of Pennsylvania, affirms the finding of the Court of Common Pleas, on the ground of the "delay", of the assignee in bankruptcy as found by the Court below, but declines to approve of the application made by the Court below, of the statute of limitation.

Neither of the Courts below, allude to the error of fact now in mind, which is, that the "case stated", Transc. of Record p. 20, marginal page 48, sets forth, that, "the schedule of assets filed by said assignee did *not* embrace said bankrupt's interest in said Telegraph Line." This is an error. The assignee's schedule *does* include the "said bankrupt's interest in said Telegraph Line." The certificate of Tinst-

man's stock therein, duly indorsed by Mr. Tinstman, was promptly turned over to assignee McCullough, was included by him in his "schedule", and passed, upon his death, into the hands of the present assignee, the plaintiff in error, where it now remains. These facts were not inserted in the "case stated", because of their supposed immateriality. The Register in Bankruptcy's Deed, post p. 29—mentioned in the case stated—Transc. of Record p. 20, marginal page 48—being in the usual statutory form, of course as the authorities herein cited to your Honors, show, carried to the assignee in bankruptcy, Tinstman's Telegraph stock, as well as the rest of his estate, and the contents of the "schedule", afterwards filed by the assignee, have no bearing whatever on the case, although it is a fact, that the schedule filed by McCullough, shows the Tinstman Telegraph stock.

The plaintiff in error now, simply in passing, invites the attention of this Court, to this error in the "case stated", not that it ever had, or ever should have had, any effect on the case, but it is an incorrect statement which should not have been allowed to appear in the "case stated".

The errors of both Courts below, culminate in the summing up of the Pennsylvania Supreme Court, in the conclusion of the opinion affirming the Common Pleas judgment, Trans. of record p. 26, marginal p. 63, that, "The parties had a right, under the circumstances, to assume that he (the assignee in bankruptcy) had made his election to abandon it", that is, abandon the Tinstman stock and dividends.

Outside of these internal evidences of error, the plaintiff in error considers the judgment of the Court of Common Pleas of Fayette county aforesaid, and that of the Supreme Court of Pennsylvania affirming the same, erroneous, illegal and void, for the additional reason, that neither of those Courts had any jurisdiction over the $947.43, involved in this controversy, because the same belonged to the assigned bankrupt estate of A. O. Tinstman, and the Court of Com-

mon Pleas had no jurisdiction whatever to do anything else in the premises than to award the said fund to the plaintiff in error upon his demand. The Court of Common Pleas aforesaid, not having awarded the said fund to the plaintiff in error, it was the duty of the Pennsylvania Supreme Court, to do so, on appeal.

The attempt of those Courts to adjudicate the plaintiff in error's rights over this bankrupt's estate, is an invasion of a foreign dominion.

The plaintiff in error now appeals to this Court, to correct the said errors of the Courts below and adjudge the said fund to him, because, the Pennsylvania State Courts had no jurisdiction to pass upon the ownership of the fund in dispute being a part of A. O. Tinstman's assigned estate.

That the jurisdiction of the United States Courts over property belonging to a bankrupt estate is exclusive, is not denied by the defendant in error, as, of course it could not be.

The plaintiff in error contends, that it necessarily follows, that the Court of Common Pleas of Fayette county had no jurisdiction to award the $947.43 in controversy, to Alpheus Beall plaintiff in the attachment execution and the defendant in error, and that the said Court of Common Pleas having no jurisdiction of the controversy, the Pennsylvania Supreme Court had no jurisdiction to affirm the judgment of the said Court of Common Pleas, and that it was error in the said Supreme Court to do anything but reverse the judgment of the said Court of Common Pleas. Irrespective of the merits of the case, the Court of Common Pleas of Fayette county aforesaid, should have awarded the money to Dushane upon his intervention—the "case stated", showing that the money in controversy was a part of the assets of an assigned bankrupt estate; and it was error for that Court not to do so, as it was error in the Pennsylvania Supreme Court, not to reverse Judge Ewing's decision for failure to award the money to the plaintiff in error.

Mr. Bumps says, Law and Practice of Bankruptcy (4th Ed.) pages 192–3, "This jurisdiction is superior and exclusive, and extends over the bankrupt, his estate, and all parties and questions connected therewith."

"This jurisdiction attaches as soon as the proceedings are commenced, and *after that time*, no other Court, and no person acting under any process from any other Court, can interfere with or withdraw the property so surrendered, or determine, in any degree, *the manner of its disposition.* The commencement of proceedings in bankruptcy, operates as a *supersedeas* of all process in the hands of the officers of any other Court, and as an injunction against all other proceedings than such as may afterwards be had under the authority of the Court of Bankruptcy, until such case is closed."

In re Barrow 1 B. R. 125.

Jones vs. Leach 1 B. R. 165.

In re Vogel 2 B. R. 138.

Pennington vs. Sale & Phellan 1 B. R. 157.

"The levy of an execution, the filing of a bill to foreclose a mortgage, the filing of a libel *in rem*, the issuing of a distress warrant, the filing of a mechanics lien claim, *where the lien only exists from the time of such filing*, or the issuing of a writ of replevin, for the purpose of affecting the estate, all, ARE NULL AND VOID, when such proceedings are instituted in any other Court, after that time."

Pennington vs. Sale & Phellan 1 B. R. 157.

In re Kerosene O. C. 2 B. R. 164.

In re Peoples Mail Steamship Co. 2 B. R. 170.

In re Wynne 4 B. R. 5.

In re Dey 3 B. R. 81.

In re Vogel 2 B. R. 138.

The case of the American File Company vs. Garrett 110 U. S. Rep. 288, cited in this case by the Pennsylvania Supreme Court, as authority for the affirmance of the judgment of the Court of Common Pleas of Fayette county

aforesaid, was an attempt to construe an agreement of the assignees in bankruptcy of Allan Chapman, concerning a part of Chapman's bankrupt estate, in such a manner as would have rendered those assignees individually liable as stockholders of the American File Company.

The decision of this Court in the case, is nothing more, than that the assignees in bankruptcy, of Chapman, so far from being individually liable for the value of the Chapman stock in the American File Company, were not, under the circumstances of that case liable to be charged with it even in their capacity of assignees in bankruptcy.

The other cases cited by the Pennsylvania Supreme Court, are to the same effect, and upon the same point, that is, cases of attempts to force responsibility for assets, upon assignees.

The Court of Common Pleas of Fayette county aforesaid, cites no decided case at all, in support of the judgment rendered, but founds the decision on the "delay" of the assignees in bankruptcy, and on the two years limitation of the 5057th section of the Revised Statutes, being a bar to the claim of the plaintiff in error, the Assignee in Bankruptcy of A. O. Tinstman.

The plaintiff in error will only say that what has been said in this argument is surely sufficient to point out the fact that the records show the Court of Common Pleas to be totally at fault, in specifying items of negligence against the plaintiff in error—not one of those items is well founded. His Honor Judge Ewing, Transcript of Record p. 22, marginal page 53, says, "It would certainly seem that an assignee in bankruptcy, with knowledge or means of knowledge of the "bankrupt's title, and where no fraud or concealment is alleged, who stands by without asserting his claim for an "unreasonable time and until after third persons have in the "prosecution of their legal right, acquired an interest in or "claim to the property, then comes too late to assert his

"claim, and especially should this be the case where the title "of the bankrupt is contested, and only established after pro- "tracted litigation, in which the assignee takes no part, and "incurs no liability, and to the FRUITS OF WHICH, he makes "no claim until considerably more than two years after they "have been judicially ascertained and secured, and after the "rights of a third party, creditor of the bankrupt, have at- "tached and cost and expenses therein been incurred."

"It would certainly seem", that his Honor, Judge Ewing was thinking of some other case, when he wrote all this. There is not a particle of foundation in the "case stated" to him, for any of it.

When the Judge went outside of the case stated, for facts, if he had got them correctly, he would have found that Tinstman's Assignee in Bankruptcy, instead of "standing by without asserting his claim," was just as much in the litigation which produced the fund in Court from April 1878, to the end of it in 1888, as any of the other use plaintiffs, either those named or those not named of record, at No. 105 September term 1882 of the Court of Common Pleas of Fayette county aforesaid. His Honor would also have found, that the litigation did not begin in 1882, as he says it did, but in April 1878. The plaintiff in error considers, however, that all these facts are immaterial to the case in hand, and that his Honor erred in considering them, and that he also erred again in supposing that Mr. Beall's attachment execution at No. 28 September Term 1888, of the Court of Common Pleas of Fayette county aforesaid, which is the case now before this Court, gave *him* (Beall), any "interest in or claim to, the property" in dispute or invested Mr. Beall with any "rights" of a third party, creditor of the bankrupt, or that such supposititious "rights" in any way "attached" themselves to the fund in dispute. His Honor Judge Ewing, says, the plaintiff in error (Captain Dushane) "stands by, without asserting his claim for an unreasonable

time, and until after third persons (Alpheus Beall) have in the prosecution of their legal right, (this attachment execution), acquired an interest in or claim to the property." "He comes too late", &c.

If ever there was a time and place, in all this litigation, for the interposition of any bar against Tinstman's assignees in bankruptcy, by reason of delay and limitation, it was in the action against the P. & C. R. R. Co., and there only.

The plain and simple facts of this case are, that after this Assignee in Bankruptcy, together with the other owners of stock in the Uniontown Telegraph Company, had through six years litigation, from 1882 to 1888, (the Bill in Equity filed in 1878, was a failure) obtained a judgment in the Court of Common Pleas of Fayette county, at No. 105 September Term 1882, for the $947.43 now involved in this controversy, the said "fruits of the litigation" being the dividends on the Tinstman ten shares of stock in the Uniontown Telegraph Line, Mr. Beall, the defendant in error, thought he would fall upon that money in satisfaction of a debt due him from Tinstman, and in order to reach it he issued the attachment execution now before the Court.

No effort of Mr. Beall's, ever tended in the slightest degree to produce the fund in dispute, and how it was possible for him to acquire as the Courts below say he did, an "interest" in it, passes all understanding.

For the Court of Common Pleas of Fayette county aforesaid to speak of Captain Dushane, standing idly by, and neglecting this item of the Tinstman estate, is simply to ignore all the facts, either inside or outside, of the "case stated" to the Court.

There is not a case decided by any Court of last resort in the land, holding that an assignee in bankruptcy can be denied possession of the bankrupt's estate in the way attempted by the Courts below in this case. If such interference through the agency of the state Courts, as is attempted

in this case, were permitted, no bankrupt's estate where such interference occurred ever would have been or ever could have been finally settled.

Attachment executions are very ready and effective instrumentalities, and are much more speedy to reach funds in the hands of solvent debtors than anything at the command of assignees in bankruptcy. It never was heard in Pennsylvania, however, before the decision of this case, that the attachment execution process, was more potent than the bankrupt act; and that this decision giving superior effect to the state process is not the uniform opinion of the Pennsylvania Supreme Court itself, appears from the decision of that Court in Ruffs Appeal 117 Pa. 310, where that Court reversed the judgment of the Court of Common Pleas of Westmoreland county, for disregarding, in a case where an assignee in bankruptcy was a party, the limitation clause of the 5057th section of the Revised Statutes, because the party essaying to set up the bar of the statute, "had not applied for such defense in proper time."

The Pennsylvania Supreme Court said in reversing the Court below in that case, page 318, "The Act of Congress is a proper and adequate reply to the plaintiff's bill, and unless he can relieve himself from its operation by showing such circumstances as will prevent its application to him, it is a conclusive one."

This is good law now, as it was in Ruffs' case, and the plaintiff in error contends, that when Dushane intervened in the Beall attachment, in 1890, not as the Courts below say, "for the first time on Dec. 11th 1890," but when as the record shows, Dushane as assignee of Tinstman appeared in the case on the 23d of April 1890, and filed his affidavit and plea on the 11th of September 1890, the Act of Congress was in this case, as it was in Ruff's case, "a proper and adequate reply" to Mr. Beall's attachment execution, and

that the reply was, and is in this case, as the Court said it was in Ruff's case, "a conclusive one."

The $947.43 involved in the controvery in this attachment execution, is, as has been said, the dividends or share of the profits of the Uniontown Telegraph stock accruing between January 1st 1874 and September 1st 1887 belonging to the Tinstman ten shares of stock, and payable by the Pittsburg and Connellsville Railroad Company.

Another action was brought on the 5th day of May 1894 upon the foundation laid at No. 105 September Term 1882, in the aforesaid Fayette county Court of Common Pleas at Number 368 of June Term 1894 in the name of James L. Shaw's administrator for the use of a number of the said stockholders, but this plaintiff in error's name is not among them, nor Tinstman's name either, although the title to the Telegraph stock and its dividends stands precisely as it did when Mr. Tinstman's creditors threw him into bankruptcy in 1876. This action is for dividends on the aforesaid Uniontown Telegraph stock, accruing since September 1st 1887, and payable by the said Railroad Company to the Telegraph stock owners. A judgment was obtained in the said action on the 24th day of October 1895 for the sum of $5500, and now stands on the records of the said Court, payable January 1st 1896.

The Tinstman stock is entitled to several hundred dollars, either of that judgment or of one yet to be obtained—to whom does that money belong? Does it belong to A. O. Tinstman, although his bankrupt estate is still in the hands of the plaintiff in error, unsettled yet, because the Court of Common Pleas of Fayette county aforesaid, has decided, that, "third persons have in the prosecution of their" "legal right, acquired an interest in, or claim to the property," (*i. e.* the dividends on the stock) and "the assignee comes" "too late to assert his claim"?

The Pennsylvania Courts have, if this decision is to

stand, wrested part of these dividends from this plaintiff in error, to give them to Mr. Beall.—What is now to be done with the stock itself, and these later accrued dividends? Mr. Tinstman has made another fortune since 1876, and of course desires his assignee, to distribute to his old creditors, all of his old assets, but if he did not so desire, surely he could not touch this stock and these dividends himself.

If the plaintiff in error can not claim the $947.43, he can not claim the stock and the later accrued dividends; Mr. Beall has received all of his claim, by the judgment of the Pennsylvania State Courts, which judgment is just as effective to bar the assignee in bankruptcy from distributing the stock and the later dividends, to the only creditors of Tinstman who are entitled to it, as it has been so far, to prevent those creditors from receiving the $947.43. Beall was a creditor of Tinstman, but he had no right to *this* fund, and if this Court should not now correct the errors of the Courts below in "awarding" it to him it is manifest that other assets of this bankrupt's estate will be absolutely wasted.

EDWARD CAMPBELL,
Att'y for Plaintiff in Error.

APPENDIX.

NARR IN NUMBER 105 SEPTEMBER TERM 1882, COMMON PLEAS OF FAYETTE COUNTY, PENNSYLVANIA.

In No. 105 September Term 1882 Common Pleas of Fayette county, James L. Shaw, the plaintiff in this suit, by Edward Campbell his attorney, complains of The Pittsburg and Connellsville Railroad Company the defendant in this suit who has been summoned to answer said plaintiff in an action of covenant. For that whereas heretofore, to wit: On the 6th day of March 1865 at the county aforesaid, by certain articles of agreement then and there made and concluded by and between the said plaintiff and the said defendant sealed with their respective seals and now to the Court here shown, the said defendant did covenant, grant and agree to and with the said plaintiff to maintain and work a certain line of telegraph to be erected by the said plaintiff between Uniontown and Connellsville, for the benefit and behoof of the said plaintiff, for and in consideration of the covenants, stipulations and agreements contained in the said article of

agreement and a certain other article of agreement therein referred to, made between the said United States Telegraph Company and the said defendant, and dated the first day of March 1865, both of which said articles of agreement are under seal, are hereby made a part of this declaration (copies of the same being thereto attached) and are here shown to the Court, all of which said covenants, stipulations and agreements in so far as they were to be performed by the plaintiff, have been fully and in good faith performed and executed by him in like manuer as he was bound by the said Articles of Agreement to do; and the said plaintiff further says that the said defendant hath (not maintained and worked the said line of telegraph;) contrary to the true intent and meaning of the said Articles of Agreement and of the said covenant of the said defendant.

And so the plaintiff saith that the said defendant, although often requested hath not kept the said covenants so by deft., made as aforesaid, but hath broken the same; and to keep the same with the said plaintiff hath hereto wholly refused and still refuses, to the damage of the said plaintiff of Ten Thousand Dollars and therefore he brings this suit.

EDWARD CAMPBELL,
Plff's. Atty.

Filed July 10th 1882.

AMENDMENT TO NARR IN NUMBER 105 SEPTEMBER 1882, COMMON PLEAS OF FAYETTE COUNTY, PENNSYLVANIA.

And for that whereas the defendant covenanted as aforesaid with the plaintiffs intestate as follows, viz: "That the party of the first part (the said James L. Shaw) for and in consideration of the maintenance and working of the line by

the said railroad company when constructed, hereby agrees to build construct and equip ready for working at his own proper cost and expense providing batteries, instruments, &c., a good and substantial line of telegraph along the line of the said railroad from Connellsville to Uniontown, and the said party of the second part viz: (the said Pittsburg and Connellsville Railroad Company) in consideration thereof hereby agrees at its own proper cost and expense to keep said line in good repair and renew the materials for operating as they shall be consumed by use and shall provide operators and officers and pay for the same and pay the said party of the first part one-half of all its earnings, subject to the stipulations in the agreement with the U. S. Telegraph Company." Yet although the plaintiffs intestate in all respect fully performed his said covenants and agreements on his part, the defendant did not perform the said covenant and agreements so as aforesaid agreed to be kept and performed by the said defendant and did not pay to the plaintiffs intestate nor to the plaintiffs nor to any one for him or them, the one-half of all the earning of the said line of telegraph between Uniontown and Connellsville. subject to the stipulations in the agreement with the U. S. Telegraph Company as aforesaid, but on the contrary the defendant did break and violate and refuse to keep the said covenants with the plaintiffs intestate and with the plaintiffs, and never did pay to the said plaintiffs the one-half of the said earnings of the said telegraph line, but failed to pay as aforesaid anything except a portion of the said earnings made as aforesaid at Uniontown aforesaid, and that for only a portion of the time since the plaintiffs intestate fulfilled and performed the covenants as aforesaid, and that the said defendant has broken defendant's said covenants in failing to pay, as aforesaid, one-half of all the earnings of the said telegraph line, subject to the stipulations in the agreements with the U. S. Telegraph Company, for the whole time since the said covenants were performed by the plaintiffs

intestate, which said earnings were made at Uniontown as aforesaid and at many other places between Uniontown aforesaid and Connellsville aforesaid, viz: at Lemont, Mount Braddock, Dunbar and other places, and although large sums of money have been earned by the said telegraph line since the performance by the plaintiffs intestate of the said covenants upon his part, at the places aforesaid, the defendant has not paid the said one-half thereof to the plaintiffs, nor to any one of them, but has taken, kept and retained the whole thereof to the entire and exclusive use of the defendant, and has taken, kept and retained and still does retain for the exclusive use and benefit of the defendant the entire telegraph line as aforesaid to the damage of the plaintiffs twenty thousand dollars.

Filed Dec. 15, 1890.

AFFIDAVIT AND PLEA OF J. M. DUSHANE.

Sept. 11th, 1890, Joshua M. Dushane, assignee in bankruptcy of A. O. Tinstman, defendant above named, having been duly sworn, says that on the 5th day of April, A. D., 1876, the said A. O. Tinstman was put into involuntary bankruptcy by proceedings begun against him in the District Court of the United States, at Pittsburg, Pennsylvania, at No. 2403 of the said Court, which proceedings are still pending and undetermined, and that this affiant is the assignee as aforesaid of the said A. O. Tinstman.

[SIGNED.] JOSHUA M. DUSHANE.

Sworn and subscribed this 11th day of September, 1890 before me.

HENRY A. WITT, Prothy.

Filed Sept. 11th, 1890.

CERTIFICATE OF APPOINTMENT OF WELTY McCULLOUGH AS ASSIGNEE IN BANKRUPTCY OF A. O. TINSTMAN.

In the District Court of the United States for the Western District of Pennsylvania.

Western District of Pennsylvania, SS.

I, S. C. M'Candless, clerk of the District Court of the United States for said district, do hereby certify that, on the 5th of April 1876, a petition was filed by certain creditors for the adjudication in bankruptcy of Abraham O. Tinstman, who, on the 3rd of June 1876, was adjudged bankrupt in pursuance thereof; that at a meeting of creditors on the 7th of July 1876, Welty McCullough, Esq., of Greensburg, Westmoreland county, Penna., was duly chosen assignee of said bankrupt's estate, which choice was on the 8th of July 1876,, approved by the Court, and, on the 12th of July 1876 the said assignee accepting the said trust, on the 13th of July 1876, an assignment of all the estate of said bankrupt was issued to him; all of which will more fully appear by reference to the record of the said matter in this Court at No. 2073 in banruptcy.

Witness my hand and the seal of said Court, at Pittsburgh, this 20th day of August 1888.

S. C. M'CANDLESS, Clerk. [SEAL.]

REGISTER IN BANKRUPTCY'S DEED TO WELTY McCULLOUGH, ASSIGNEE OF A. O. TINSTMAN.—Deed Book 31, Pages 483–4. Recorder's office of Fayette County, Pennsylvania.—Rev. St. Sec. 5044.

In the District Court of the United States for the Western District of Pennsylvania. In the matter of Abraham O. Tinstman, Bankrupt, No. 2703 in Bankruptcy.

Western District of Pennsylvania, SS.

Know all men by these presents that Welty McCullough, Esq., of Greensburg, in the county of Westmoreland and State of Pennsylvania in said District, has been duly appointed assignee of Abraham O. Tinstman of Broadford in the county of Fayette and state of Pennsylvania, Bankrupt.

Now, therefore, I Samuel Harper, Register in Bankruptcy in said district, by virtue of the authority vested in me by the 14th section of an Act of Congress entitled "An Act to establish a uniform system of Bankruptcy throughout the United States", approved March 2, 1867, do hereby convey and assign to the said Welty McCullough, Esq., assignee as aforesaid, all the estate, real and personal, of the said Abraham O. Tinstman, bankrupt aforesaid including all the property of whatsoever kind of which he is possessed or in which he was interested or entitled to have, on the fifth day of April, A. D. 1876, WITH ALL HIS DEEDS, BOOKS AND PAPERS RELATING THERETO, excepting such property as is exempted from the operation of this assignment by the provisions of the said fourteenth section of said Act—To Have and To Hold all the foregoing premises to the said Welty McCullough, Esq., and his heirs forever, In trust, nevertheless for the use and purposes with the powers and subject to the conditions and limitations set forth in said Act.

In witness whereof I, the said Register, have hereunto set my hand and caused the seal of said Court to be affixed this thirteenth day of July, A. D. 1876.

[SEAL.] [SIGNED.] SAML. HARPER,
Register in Bankruptcy.

Attest:
S. C. M'CANDLESS,
Clerk of the District Court, for said District.

CERTIFICATE OF STOCK.

Shares Twenty-five Dollars Each.

UNIONTOWN, PENNSYLVANIA.

[No. 32.] [TEN SHARES.]

TELEGRAPH COMPANY.

This is to Certify

That A. O. Tinstman is entitled to ten shares of stock of the capital stock of the Uniontown Telegraph Company, transferrable, in person or by attorney, on the Books of said Company, on surrender of this Certificate.

Witness the signatures of

D. KAINE, Prest.

A. HADDEN, Secretary.

October 16th, 1865. Of the said Company.

Endorsed—A. O. TINSTMAN.

[illegible]

In the Supreme Court

OF THE UNITED STATES

JOSHUA M. DUSHANE, Assignee [illegible]
of ABRAHAM O. TIEFFENBACH
Plaintiff in Error

vs.

ALPHEUS BEALL,
Defendant in Error

In Error to the Supreme Court of the State of Pennsylvania

Brief for Defendant in Error

INDEX

Statement of the Case 1
Point of Argument 1

LEONI [illegible]
Attorney for Defendant in Error

CERTIFICATE OF STOCK.

Shares Twenty-five Dollars Each.

UNIONTOWN, PENNSYLVANIA.

[No. 32.] [TEN SHARES.]

TELEGRAPH COMPANY.

This is to Certify

That A. O. Tinstman is entitled to ten shares of stock of the capital stock of the Uniontown Telegraph Company, transferrable, in person or by attorney, on the Books of said Company, on surrender of this Certificate.

Witness the signatures of

D. KAINE, Prest.

A. HADDEN, Secretary.

October 16th, 1865. Of the said Company.

Endorsed—A. O. TINSTMAN.

DEC 18 1895
JAMES H. MCKENNEY
CLERK.

No. 134 *OCTOBER TERM, 1895*

[RECORD No. 772. OCT. TERM, 1893]

In the Supreme Court

OF THE UNITED STATES

JOSHUA M. DUSHANE, Assignee in Bankruptcy of ABRAHAM O. TINSTMAN
Plaintiff in Error

vs.

ALPHEUS BEALL
Defendant in Error

In Error to the Supreme Court of the State of Pennsylvania

Brief for Defendant in Error

INDEX

PAGE

Statement of the Case 1
Brief of Argument 2

LEONI MELICK
Attorney for Defendant in Error

N 25

In the

Supreme Court of the United States.

JOSHUA M. DUSHANE, Assignee,
vs.
ALPHEUS BEALL.

Oct. Term, 1893.

No. 772.

Statement of the Case.

Alpheus Beall obtained a judgment against Abraham O. Tinstman in the Court of Common Pleas of Fayette County, Pa., and in June, 1888, issued an attachment sur judgment against Tinstman and served the Pittsburg and Connellsville Railroad Company as garnishee.

In December of 1890, Joshua M. Dushane, the assignee in bankruptcy of said Tinstman, intervened in the said suit and claimed the fund attached. The claim of said Dushane as assignee was as follows: That in April of 1876 Tinstman was adjudicated a bankrupt, that whatever was due from the said railroad to Tinstman arose by reason of a claim on the part of said Tinstman for damages against the said railroad covering the period from January 1874, to September of 1887, that is to say, part of the indebtedness of the railroad to Tinstman was due at the time Tinstman was adjudicated a bankrupt. The claim was resisted by Beall upon the ground of laches. Dushane did not become the assignee in bankruptcy of Tinstman until September of 1890; he succeeded one McCullough, who had been such assignee from 1876. During McCullough's

life he had made no claim upon the fund, although he acted as such assignee for over thirteen years. He had not claimed it because it was a right of action which might involve large expenses, or more than the claim was worth. Tintsman, himself, claimed the fund in October of 1885, and Dushane first claimed as assignee of the bankrupt fourteen years and five months after the appointment of the first assignee. The Court of Common Pleas sustained the contention made in behalf of Beall, and thereupon the said Dushane appealed to the Supreme Court of Pennsylvania, which Court, on May 23, 1892, affirmed the judgment of the Court below, whereupon the said Joshua M. Dushane took his writ of error to this Court.

Argument.

The writ of error in this case should be dismissed. This Court has not jurisdiction. There was no question involved in the Court below which comes within the provisions of Sec. 709 of the Act of February 5, 1867, allowing a writ of error to the Supreme Court of the United States from the Supreme Court of one of the States.

The plaintiff in the writ of error intervened in an action brought in the Court of Common Pleas of Fayette County and from that Court appealed to the Supreme Court of Pennsylvania. At no time did he contend that the State Courts had not jurisdiction over the subject-matter by reason of the fact that his claim was that of an assignee in bankruptcy. Had he so contended, his remedy would have been, if the contention were sound, to have removed the case by petition into the Federal Court. No such effort was made.

But the said Court of Common Pleas and the Supreme Court had ample jurisdiction over the subject-matter.

The exclusive jurisdiction vested in the Courts of the United States of "all matters and proceedings in Bankruptcy" by the Act of March 2, 1867, refers to the jurisdiction as a Court of Bankruptcy over the proceedings in bankruptcy initiated by the petition, and ended in the distribution of assets among the creditors and the discharge, or the refusal of the discharge of the bankrupt.

But the Federal Courts have concurrent jurisdiction with the State Courts in suits by or against the assignee in bankruptcy, in referenee to alleged property of the bankrupt or to claims alleged to be due from or to him.

Lathrop vs. *Drake et al.*, 91 U. S., p. 516.

In the above case, BRADY, J., said: "The State Court may undoubtedly be resorted to (by the assignee in bankruptcy) in cases of ordinary suits for the possession of property or the collection of debts.

Under the Bankruptcy Act of 1867, the assignee might sue in the State Courts to recover the assets of the bankrupt, no exclusion of jurisdiction being given to the Courts of the United States.

Claflin vs. *Houseman*, 93 U. S., p. 130.

The debtor of a bankrupt loses none of his rights by the bankruptcy of his adversary, the same Courts remain open to him, and the Bankrupt Act has not divested those Courts of jurisdiction in actions against the bankrupt.

Eyster vs. *Gaff*, 91 U. S., p. 521.

As to the merits of the case decided below.

The following is a chronological order of events:

April, 1876. Tinstman was adjudicated as bankrupt.
July, 1876. McCullough was appointed his assignee.
Jan., 1877. Tinstman was duly discharged.
1882. Shaw brought suit against the Pittsburg and Connellsville Railroad.
Oct., 1885. Tinstman was made use plaintiff.

Oct., 1886. Beall obtained judgment for $730.54 against Tinstman.

June, 1888. Beall issued attachment *sur* judgment against Tinstman and served Pittsburg and Connellsville Railroad as garnishee.

The judgment of Shaw to use of Tinstman against the Pittsburg and Connellsville Railroad was for damages covering the period from January, 1874, to September, 1887.

Dec., 1889. McCullough, assignee, died.

Sept., 1890. Dushane appointed assignee.

Dec. 1890. Dushane intervened in the suit of *Beall* vs. *Tinstman*, defendant, and the Pittsburg and Connellsville Railroad, garnishee, and claimed the fund as assignee in bankruptcy.

McCullough, the first assignee, acted from July, 1876, to his death, in December, 1889, that is, thirteen years and five months, and never claimed the fund.

Tinsman appeared upon the record as a claimant of the fund in October, 1885.

Dushane first claimed the fund fourteen years and five months after the appointment ot the first assignee, and thirteen years after the bankrupt's discharge.

It will thus appear that the plaintiff in error and McCullough, whom he succeeded, had been guilty of such laches that no court will help him (McCullough), or the defendant in error has a right to assume that the assignee of Tinstman had made his election to abandon the claim.

Sparhawk vs. *Yerkes*, 142 U. S., p. 1.

As appears in the case stated, on page 20 of the record, the claim out of which the fund in dispute arises was not contained in the schedule of assets filed by the assignee. It was a mere right of action which might be advantageous or very disadvantageous for the assignee to pursue. Such claims do not pass to the assignee without a distinct acceptance by him, and in the absence of such acceptance it remains with the bankrupt.

Glenney vs. *Langdon*, 98 U. S., p. 20.
American File Co. vs. *Garrett*, 110 U. S., p. 288.

The first claim by the assignee of Tinstman was made fourteen years and five months after the assignee might have brought suit upon such claim, that is, over two and one-third times the statutory period allowed in the State of Pennsylvania during which suits on contract may be brought.

It appears from the Paper Book of plaintiff in error page 3, that suit was first brought upon the claim out of which this fund in dispute arose against the Railroad Company in April of 1878; in January of 1882, nearly four years later, it was decided by the Supreme Court of the State that the four years of litigation was utterly idle, as the claimant's remedy was in the court of law, and not of equity. McCullough, the assignee, did well to be no party to this litigation, which might have involved him in large costs, and he did well to decline to receive such an asset as this claim against the railroad, as the assignee of Tinstman.

No proceeding apparently was brought and proceeded with until the Supreme Court of Pennsylvania decided in favor of the claim, May 21, 1888. That is to say, ten years and one month were occupied in this litigation, and during all of this time the assignee (McCullough), in the exercise of his discretion, apparently declined to have anything to do with this questionable claim. As he took that

position it will be considered as an abandonment of the claim, and his successor, Dushane, ought not to be permitted for the first time, in December of 1890, to attempt to reap the fund which had been realized through the perseverence of the defendant in error in pushing a doubtful claim and incurring a great expense.

LEONI MELICK.